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CONVEYANCER'S NOTEBOOK.

Licence to erect an air-raid shelter.—A correspondent has written in connection with the form of licence by a landlord to his tenant to erect an air-raid shelter (Form 10, p. 370) pointing out that the notes should refer to section 32 of the Civil Defence Act, 1939, as this section authorises some tenants to erect a shelter without the landlord's permission. Section 32 provides: "(1) The owner of any dwelling-house may execute any works for the purpose of providing air-raid shelter in the dwelling-house or in or on any land belonging to or occupied with the dwelling-house, notwithstanding any limitation on his interest in the dwelling-house or the said land or any agreement or restrictive covenant to the contrary. (2) In this section the expression 'owner', in relation to any dwelling-house, means the person in whom the fee simple is vested, and includes also a lessee of the dwelling-house under a lease the unexpired term of which exceeds three years."

This section is of very limited application as between landlords and tenants as it only applies where, at the time of the erection of the shelter, a lease has more than three years to run. Where it does apply it authorises the "erection of any works" for the purpose of providing the shelter. How far this statutory power authorises a tenant to make drastic structural alterations to premises when erecting an indoor shelter is not quite clear, nor is it apparent what is the position when the lease determines. When the lessee gives up possession it would seem that the section will not affect the tenant's liability under the covenants of the lease to

leave the premises in proper repair and to make good damage caused by the erection of the shelter. The section is far from explicit and in most cases, except where there is a very long term still to run, it seems that where an indoor shelter is erected with drastic modifications of structure the landlord and tenant should come to an agreement as to their mutual rights and liabilities before its erection.

D. C. L. C.

Repair of war damage—precedents.—A correspondent writes: "Having regard to the provisions of section 1 (1) (3), Landlord and Tenant (War Damage) Act, 1939, can the Precedents Forms Nos. 8 and 9 at pp. 364 and 367 respectively of the December issue of *The Conveyancer* be made binding on the parties?"

The two precedents to which our correspondent refers are agreements between landlord and tenant providing for the repair of premises which have suffered war damage. It seems to be clear that the Landlord and Tenant (War Damage) Act, 1939, does not prohibit binding agreements for the repair of existing war damage. Section 1 (3) only applies to obligations to make good war damage contained in "a disposition or contract collateral thereto". The Act contains no definition of "disposition" but it would seem to refer to a transaction in the nature of a lease whereby a right in property passes and not to agreements to make good war damage, apart from any dealings with the land. This view is borne out by section 21 which provides that: "The provisions of this Act shall have effect in relation to war damage, notwithstanding any contract to the contrary made before that damage occurred." This section recognises by implication the right to enter into agreements in respect of damage which has already occurred.

H.M. Land Registry.—The Chief Land Registrar thinks it may be helpful if he reminds solicitors that when wishing to compare abstracts of land certificates supplied to them by vendors with the register and filed plans at Bournemouth, it is open to them, if authorised to inspect the register, to apply by post for an office copy of the register and of the filed plan (where the latter is considered desirable). These are supplied in normal cases for a fee of 1s. 6d. and 2s. respectively. The application may be in any form—a letter is sufficient—if accompanied by the authority to inspect the register.

It greatly facilitates matters, however, if in the first instance the vendor supplies office copies of the register and filed plan instead of preparing them himself, as under section 113 of the Land Registration Act, 1925, such office copies are admissible in evidence to the same extent as the original.

The Chief Land Registrar would also remind solicitors that prints of Land Registry forms are purchasable from H.M. Stationery Office. They cannot be obtained from the Land Registry.

LIABILITIES OF LANDLORD AND TENANT IN RESPECT OF DISREPAIR, NUISANCE AND DANGEROUS PREMISES.

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Part II.

Contractual Obligations to Repair.

A contract in the lease or tenancy agreement as to the maintenance of the premises demised in a state of repair is a covenant which runs with the land and binds assigns (*Williams* v. *Earle* (1868), L. R. 3 Q. B. 739), but it creates obligations only between landlord and tenant, and a third party cannot recover any damages for its breach (*Cavalier* v. *Pope*, [1906] A. C. 428), although (as has been seen in Part I of this Article) it has a bearing upon the question of the landlord's liability for a nuisance occasioned by disrepair.

Such contracts may be set out in express terms or, in the absence of (but, in one case, notwithstanding) an express contract on the subject, may be implied by law. The subject of repairing covenants in leases is comprehensively dealt with in the text-books (see, for example, *Woodfall*, 24th edition, p. 692; *Foa*, 6th edition, p. 244); it is not therefore proposed to deal at all exhaustively with the subject here, but to discuss a few of the more interesting points which arise in connection with contracts to repair, whether expressed or implied.

(a) *Express Contracts.*

A covenant to repair and keep in repair during the term means that the premises must be maintained in repair at all times during the term (*Luxmoore* v. *Robson* (1818), 1 B. & Ald. 584), and if they are not in repair when the tenant takes over such a covenant entered into by him obliges him to *put* them into repair (*Proudfoot*

v. *Hart* (1890), 25 Q. B. D. 42; *Payne* v. *Haine* (1847), 16 M. & W. 541). Usually the expression "repair" is fortified by some such words as "good tenantable" or "habitable". Generally speaking, these various expressions mean much the same thing, and "good tenantable repair" has been defined as being "such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it": *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42. The class of tenant likely to take the house is to be determined by reference to the time of the demise, not the time when repairs come to be executed: *Calthorpe* v. *McOscar*, [1924] 1 K. B. 716. The standard of repair required by a covenant is not varied by an improvement or deterioration in the class of tenants living in the locality.

The condition of the premises at the commencement of the lease has a bearing upon the construction of a repairing covenant, for it shows what standard of repair was present to the minds of the parties when the lease was entered into, and generally speaking it is reasonable to suppose that an intention that such standard should be improved upon would be clearly expressed (see, for example, *Walker* v. *Hatton* (1842), 10 M. & W. 249). But where a covenant either expressly or by implication calls for the premises to be *put* into repair, the standard required by the covenant is not governed by the state in which the covenantor found the premises (*Belcher* v. *M'Intosh* (1839), 2 Moo. & R. 186; *Brown* v. *Trumper* (1858), 26 Beav. 11) and this applies even where the obligation to *put* into repair is only drawn by inference out of a covenant to keep and deliver up in repair (*Proudfoot* v. *Hart*, *supra*). Nevertheless, the question whether the house demised was a new house or an old house, and its state considered generally from that point of view, though not in matters of detail, are always relevant to the construction of a repairing covenant (*Stanley* v. *Towgood* (1836), 3 Bing. N. C. 4; *Mantz* v. *Goring* (1838), 4 Bing. N. C. 451; affirmed 6 Scott 277), for a lessee who covenants to repair an old house demised to him is bound only to keep up the house as an old house and not to give back to the lessor a new one (*Lister* v. *Lane*, [1893] 2 Q. B. 212).

Repair often involves the rebuilding or renewal of a subsidiary part of the whole, and this falls within the ambit of a repairing covenant provided that the renewal required does not extend to substantially the whole of the subject-matter of the covenant: *Lurcott* v. *Wakeley*, [1911] 1 K. B. 905; *Torrens* v. *Walker*, [1906] 2 Ch. 166. In the latter case the covenant related to the "outside walls", practically the whole of which required to be

rebuilt : it was held that this, since it would have involved giving back a new thing altogether in place of the subject-matter of the covenant, did not fall within the terms of the covenant. But where a part of a wall, as in *Lurcott* v. *Wakeley*, is in need of rebuilding, or a floor requires remaking, that is clearly covered by a repairing covenant. Buckley, L.J., said in *Lurcott* v. *Wakeley* : " Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion." To a like effect is the definition given by Lord Atkin in *Calthorpe* v. *McOscar*, where he says that repair " connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole. Time must be taken into account; an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken."

A qualification of the obligation to repair which is frequently expressed in leases is the exception of " fair wear and tear ". The meaning of this expression was considered by the writer in an article in vol. 2 of *The Conveyancer*, at p. 1, where the modern authority on the meaning of this expression, *Taylor* v. *Webb*, [1937] 2 K. B. 283, is discussed at some length.

An obligation to repair imports a duty not to destroy (*Gange* v. *Lockwood* (1860), 2 F. & F. 115; *Doe* v. *Bird* (1833), 6 C. & P. 195) and at one time the tendency was to carry this principle to extreme lengths (see, for example, *Doe* v. *Jackson* (1817), 2 Stark. 293), but it has more latterly been established that an alteration involving the pulling down of subsidiary portions of the structure is not a breach of the repairing covenant if its object be to enable the user of the premises for a purpose not prohibited by the terms of the lease (*Doe* v. *Jones* (1832), 4 B. & Ad. 126; *Hyman* v. *Rose*, [1912] A. C. 623; *Woolworth & Co.* v. *Lambert*, [1937] Ch. 37, *per* Romer, L.J., at p. 60). Of course, in relation to the execution of such works the effect of a covenant against the making of alterations, as modified by section 19 of the Landlord and Tenant Act, 1927, has to be considered.

It is usual, and indeed much the better practice, to provide in express terms for the painting and papering which a tenant is required to do under a repairing lease. Some degree of painting is included, however, in the mere term " repair " : see *Monk* v. *Noyes* (1824), 1 C. & P. 265. A covenant to repair, without mention of painting, does not extend to painting which is merely decorative

(see, for example, *Crawford* v. *Newton* (1886), 36 W. R. 54), but obliges the covenantor to carry out such painting and papering as will put the premises into such a condition that they would be taken by a reasonably minded tenant of the class likely to take them : *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42.

The obligation to repair raises the same standard of duty whether the covenanting party be the landlord or the tenant. But there is this important distinction between a landlord's repairing covenant and a tenant's covenant : a covenant on the part of the landlord to repair the demised premises is always construed as a covenant to repair *on notice of the want of repair being given to him by the tenant* (*Makin* v. *Watkinson* (1870), L. R. 6 Ex. 24; *Torrens* v. *Walker*, [1906] 2 Ch. 166), whereas a tenant's repairing covenant is an absolute contract by him to maintain the premises in the condition specified, and it is for him to ascertain for himself what dilapidations exist. The good sense behind this rule is that the tenant has and the landlord has not the means of knowing the state of repair of the premises, but the same distinction is observed even where the landlord has by contract a right to enter and inspect (*Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131) or where in the particular circumstances the landlord has, and the tenant has not, the means of knowing and neither party knows in fact of the defect (*Hugall* v. *M'Lean* (1885), 53 L. T. 94). It seems that if the landlord has actual notice from some other source, notice by the tenant is dispensed with (*per* Wright, J. (as he then was), in *Griffin* v. *Pillet*, [1926] 1 K. B. 17), though a contrary opinion was expressed by Brett, M.R., in *Hugall* v. *M'Lean* and by Warrington, J., in *Torrens* v. *Walker*. It was in one case held that where the defect is latent, so that the tenant is in fact practically denied the opportunity of giving the landlord notice of it before damage occurs, the rule requiring notice to be given as a condition precedent of the landlord's obligation is suspended : *Fisher* v. *Walters*, [1926] 2 K. B. 315; but it appears from *Morgan* v. *Liverpool Corporation*, *supra*, that this view is erroneous, and that the requirement of notice is the same whether the defect be latent or patent. The rule requiring notice applies equally to the implied obligation cast upon the landlord in certain cases by section 2 of the Housing Act, 1936 (*Morgan* v. *Liverpool Corporation*, *supra*; and see also below).

It is particularly to be observed that the giving of notice to the landlord is a *condition precedent* of the landlord's obligation : until he has received notice of the defect the landlord is in no wise in default, he is guilty of no non-feasance, upon his covenant. The significance of this in relation to the rule of liability laid down in

Wringe v. *Cohen* has already been discussed in Part I of this article. Indeed, having regard to the opinions expressed in *Wringe* v. *Cohen* it would seem very likely that but for the clear view expressed in *Morgan* v. *Liverpool Corporation* the Court which decided *Wringe* v. *Cohen* would if the point had come before it for decision have preferred the rule laid down in *Fisher* v. *Walters*.

The rule requiring notice of the disrepair has no application to an obligation of the lessor in respect of a part of the premises retained under the lessor's own control : *Melles* v. *Holme*, [1918] 2 K. B. 100; *Bishop* v. *Consolidated London Properties* (1933), 102 L. J. K. B. 257.

(b) *Implied Contracts.*

Apart from the liability in respect of waste (all tenants are bound not to commit voluntary waste, and tenants for terms of years are liable also for permissive waste : Statute of Marlebridge, s. 2; *Yellowly* v. *Gower* (1855), 11 Ex. 274; *Torriano* v. *Young* (1833), 6 C. & P. 8), which is a liability in tort (*Defries* v. *Milne*, [1913] 1 Ch. 98), there is an implied contract by a tenant to use the premises in a tenantlike manner and to deliver them up at the end of the term unless prevented from so doing by the act of God : *Marsden* v. *Heyes*, [1927] 2 K. B. 1. Of course, an express covenant by the tenant to repair excludes any such implied obligation : *Standen* v. *Christmas* (1847), 10 Q. B. 135.

The extent of this implied obligation was considered in *Ferguson* v. —— (1797), 2 Esp. 590; *Horsefall* v. *Mather* (1815), Holt N. P. 7; *Auworth* v. *Johnson* (1832), 5 C. & P. 239; and in *Leach* v. *Thomas* (1835), 7 C. & P. 327. In *Auworth* v. *Johnson* and *Leach* v. *Thomas* the obligation of a tenant from year to year was said to be to keep the premises wind and water tight. In *Marsden* v. *Heyes*, *supra*, Atkin, L.J. (as he then was), said in relation to a tenant from year to year : " The precise obligation of such a tenant in relation to the premises has been the subject of discussion for over a century, and I am not sure that the obligation can be satisfactorily defined, for it must depend upon the relation between the parties, the character and state of the demised premises, and other varying circumstances. But the cases cited from Espinasse and Holt's Nisi Prius Reports, at least 110 years old, show that there is an obligation upon the tenant to use the premises in a tenantlike or, which is the same thing, a husbandlike manner. It follows that he is under a continuing obligation to repair acts which would amount to voluntary waste and which involve a breach of the obligation to use the premises in a husbandlike manner."

Another modern case where the same liability was considered was *Wedd* v. *Porter*, [1916] 2 K. B. 91, C. A., where Swinfen Eady, L.J., said : " A tenant from year to year of a farm and buildings at a fixed rent, who has not entered into any other express agreement with the landlord than as to the amount of the rent, is under an obligation implied by law to use and cultivate the lands in a husbandlike manner, according to the custom of the country : *Horsefall* v. *Mather*; *Powley* v. *Walker* (1793), 5 T. R. 373; *Onslow* v. *Anon* (1809), 16 Ves. 173 (subject to the provisions of the Agricultural Holdings Act, 1908), and to keep the buildings wind and water tight : *Auworth* v. *Johnson*; *Leach* v. *Thomas*; but is not liable to ' sustain and uphold the premises ' : *Auworth* v. *Johnson*." This seems to afford a fairly clear definition of the extent of a tenant's obligation under his implied contract, but curiously enough the case of *Wedd* v. *Porter* does not appear to have been brought to the notice of the Court of Appeal in *Marsden* v. *Heyes*.

Amongst matters which have been held to fall within the scope of the tenant's implied obligation may be mentioned the following : putting in windows or doors *which have been broken by the tenant* (*Ferguson* v. ——); damage caused by the making of structural alterations for the purpose of altering the user (*Marsden* v. *Heyes*); and (in a county court) the importation of bugs and fleas into the premises in large quantities by the tenant (*Shaw* v. *Anthony* (1939), Estates Gazette, Vol. 133, p. 342). But in connection with the last-mentioned case it must be remembered that a tenant does not impliedly warrant, even on the taking of furnished lodgings, that he is a fit and proper person to occupy the premises : see *Humphreys* v. *Miller*, [1917] 2 K. B. 122, a case of infectious disease. This case was, however, adversely commented on by McCardie, J., in *Collins* v. *Hopkins*, [1923] 2 K. B. 617. In the Scottish case of *Mickel* v. *M'Coard*, [1913] S. C. 896, a tenant who left a house unoccupied for a month in winter without turning off the water or informing the landlord of his absence was held liable for damage to the water pipes occasioned by frost, and it seems safe to say that such conduct would be untenantlike user within the meaning of the rule here being considered.

It is only in certain defined cases of limited application that the landlord comes under any implied obligation as to the condition or repair of the demised premises. The general rule is a rule of *caveat emptor* : there is no implied obligation that he will do any repairs whatever or that the house will endure during the term, nor that the premises are or shall be fit for habitation, occupation, cultivation or for any other particular purpose ; see *Hart* v. *Windsor*

(1844), 12 M. & W. 68; *Sutton* v. *Temple* (1843), 12 M. & W. 52; *Arden* v. *Pullen* (1842), 10 M. & W. 321; *Gott* v. *Gandy* (1853), 2 E. & B. 845; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; *Cruse* v. *Mount*, [1933] Ch. 278. So, even though there may be dangerous defects in the premises, existing perhaps to the knowledge of the landlord when he let the premises, possibly even constructed by the landlord or directly due to his lack of care, nevertheless the landlord comes under no implied obligation in respect of them (*Lane* v. *Cox*, [1897] 1 Q. B. 415; *Bottomley* v. *Bannister*, [1932] 1 K. B. 458). *Lane* v. *Cox* was a case of a house let with the staircase in an unsafe condition; *Bottomley* v. *Bannister* was not so strong a case since the gas appliance which there caused the damage did not appear to be dangerous when let but only became so after the adjustment had been altered by the tenant or his wife. The recent case of *Davis* v. *Foots*, [1940] 1 K. B. 116, affords the clearest possible example of the severity of this rule. In that case the plaintiffs had been in occupation of the flat themselves and when vacating it for the occupation of the tenants to whom they had agreed to let it they turned off the gas at the meter and then removed a gas fire without leaving on the pipe from which they had disconnected it any tap or other means of preventing the escape of gas. This dangerous state of affairs brought about a fatal accident when the tenants went into possession, but notwithstanding the fact that the landlords had actually created the danger themselves where none before existed the Court of Appeal held that no liability lay upon them. The rule as exemplified in this case is unquestionably harsh and it is surprising that the Legislature has never taken any step to modify its strictness, other than by the introduction of the limited statutory exception to the rule mentioned below.

Amongst the limited exceptions to this strict rule the first to be noted is that relating to the letting of furnished dwelling-houses. Upon the letting of such there is an implied warranty, in the nature of a condition, that the premises shall be reasonably fit for habitation at the date fixed for commencement of the tenancy. This rule was laid down clearly in *Wilson* v. *Finch Hatton* (1877) 2 Ex. D. 336, and in *Collins* v. *Hopkins*, [1923] 2 K. B. 617. The former was a case of defective drains, the latter of recent occupation by a person suffering from pulmonary tuberculosis. The fundamental principle lying behind this exception seems to be that a contract for a tenancy of a furnished dwelling-house to commence on a certain date is a contract that the house shall be ready for occupation on that date (see *per* Kelly, C.B., in *Wilson* v. *Finch Hatton*, at p. 341). In the case of an unfurnished letting all that the lessor contracts to give is vacant possession so that the tenant

may make the premises ready for occupation. There was some tendency to limit the exception to lettings for a short period of time only (see *Powell* v. *Chester* (1885), 52 L. T. 722, and see *per* Kelly, C.B., in *Wilson* v. *Finch Hatton*, *supra*, where he speaks of a person who "takes a furnished house for a brief period of time"). But it is evident that the law recognises no such limitation of the rule. In *Wilson* v. *Finch Hatton* the rule is stated in general terms by all the Judges, and in *Collins* v. *Hopkins* McCardie, J., says, after stating the rule on the subject, "Not only is the implied warranty on the letting of a furnished house one which, in my view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted."

The classic authority for this implied warranty is of course *Smith* v. *Marrable* (1843), 11 M. & W. 5, which is not altogether a satisfactory case, however, because Parke, B., based his decision on old cases since overruled which drew no distinction between a furnished and an unfurnished letting. The decision in *Smith* v. *Marrable* was actually correct, because the house was furnished in that case : see the later observations of Parke, B., himself in *Hart* v. *Windsor* (1843), 12 M. & W. 68, at p. 86. And in *Smith* v. *Marrable* Lord Abinger said, at p. 9, "A man who lets a ready-furnished house, surely does so under the implied condition or obligation that the house is in a fit state to be inhabited."

It is particularly to be noted that breach of the condition by the landlord entitles the tenant the repudiate the tenancy and refuse to pay any rent (*Wilson* v. *Finch Hatton*, *supra*). But it has been held that the implied obligation extends only to the condition of the dwelling-house when the landlord lets it; there is no implied warranty that it will continue fit for habitation during the term, nor even need a resident landlord inform the tenant of the fact that the house has subsequently become insanitary (*Sarson* v. *Roberts*, [1895] 2 Q. B. 395). This whittling away of the rule by the Court of Appeal is difficult to reconcile on principle, and evidently did not meet with the approval of McCardie, J. (see *Collins* v. *Hopkins*, at p. 620), but it stands as an authority governing and limiting the rule.

Whether the state of the house amounts to a breach of the condition is of course a question of fact, and in the case of infectious disease germs the question is whether there is an actual appreciable risk to the tenant, his family or household, by entering and occupying the house in which the infectious disorder occurred (*Collins* v.

Hopkins, *supra*). It would seem that a test in corresponding terms could be applied, for example, to a case of bad drainage.

A note of warning may be directed to the question, what is a *furnished* letting within this rule. One is accustomed to cases under the Rent Restrictions Acts, for the purposes of which a letting may be considered to be furnished though the rooms are not fully furnished, provided that the amount of rent which is fairly attributable to the use of furniture forms a substantial portion of the whole rent (see the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1)). It is thought that quite a different test is applicable here in relation to the implied warranty or condition, and that, having regard to the reasons for this exceptional rule given in the cases, the real question is whether the dwelling-house is let by the landlord so furnished that the tenant can make it his habitation forthwith from the date it is let to him. No reported authority is known to the writer on this particular question, but it does seem that the principles stated in the cases cited above, distinguishing the case of a furnished from that of an unfurnished letting, are hardly applicable where premises are let only half furnished so that the tenant must himself undertake further furnishing before it could reasonably be said that the dwelling-house is ready for immediate occupation.

Before passing from this subject the observation may be made that in the writer's opinion the line of demarcation drawn by the Courts, though based upon a logical distinction, is lacking in merit. Surely there is a better case, or at least as good a case, on common-sense grounds, for implying the warranty upon an unfurnished letting of a new flat in a block of flats, where the tenant is probably prohibited from interfering with the structure and is strictly limited to residential user, than there is upon the letting of an old house ready furnished for a term of years. This is, however, purely a matter of debate and speculation, the principles stated in the cases cited above being now clearly settled by a long line of authority. It may be mentioned in passing that if a lease of a dwelling-house is entered into while the house is still in course of erection, an undertaking is to be implied on the part of the lessor that the house *when completed* shall be fit for human habitation (see *Perry* v. *Sharon Development Co.*, [1937] 4 All E. R. 390, comparing *Hoskins* v. *Woodham*, [1938] 1 All E. R. 692).

The Legislature has tackled this problem not by modifying in any way the common law principles stated above but by introducing an exception in the case of dwelling-houses let within certain limits of low rental value, the object being presumably to give protection to that class of tenants least likely to be able to give

or afford to procure a competent examination of the property before taking a tenancy of it. In every contract for letting a house for human habitation at a rent "not exceeding £40" in the county of London and £26 elsewhere, there is to be implied, *notwithstanding any stipulation to the contrary*, a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation: Housing Act, 1936, s. 2, replacing earlier enactments. By sub-section (3) of section 2 the expression "house" is defined as including a part of a house, and "landlord" means any person who lets for human habitation to a tenant any house under any contract referred to in the section, and includes his successors in title. A right of entry to view the state and condition is given to the landlord by sub-section (2). The section applies to contracts whenever made, excepting contracts made before July 31, 1923, where the rent exceeds £16 and the house is not within the county of London or any borough or urban district which at the date of the contract had, according to the last published census, a population of 50,000 or upwards. There is also a proviso excluding from the section contracts for letting for a term of not less than three years upon the terms that the house be put by the lessee into a condition reasonably fit for human habitation, and the lease is not determinable by either party within the three years.

It is curious that the section stipulates a rent "not exceeding £40" without stating what is obviously meant, namely, "£40 by the year". The section also omits to state whether it applies to, say, a letting at a weekly rent which amounts to the rate of £40 by the year. This point was taken by the landlord in *Rousou* v. *Photi* (1940), 56 T. L. R. 685, and although the case was actually decided against the landlord on another ground (see below) the Court of Appeal expressed its opinion on the question. The case of *Rousou* v. *Photi* is discussed at some length in a note by the writer in Vol. 4 of *The Conveyancer*, at p. 435. For the reasons stated there, and having regard to the judgments of the Court of Appeal in *Rousou* v. *Photi*, it is suggested that what the section really means to say is "at a rent not exceeding . . . *the rate of* forty pounds *by the year*", whether the rent is payable in yearly or weekly instalments or otherwise. Most dwelling-houses falling within the rental limits specified in the section are in fact let upon weekly tenancies, and it is clear that the Act is intended to apply to such. It was also suggested in *Rousou* v. *Photi* that where a weekly rent is reserved the rate at which the house is let by the year is to be ascertained by multiplying by some

multiplyer other than fifty-two, in accordance with rating practice, in order to allow for possible void periods, and some colour is lent to this view by the judgment of Scott, L.J., in the Court of Appeal. This point has not, however, actually been decided, and it is thought that such a view is definitely erroneous, because under this section what has to be ascertained is the rent reserved by the contract of letting, not, as in rating, the net annual value (of which the rent paid by the occupier is merely evidence). The rent reserved by the contract of letting, measured as a rate by the year, is the weekly rent multiplied by fifty-two. If the tenant vacates before completion of the year he will have been paying rent *at that rate*, though for rating purposes it would be unfair on the landlord to assume that he will always have a tenant occupying the premises throughout the year and paying rent at that rate.

The ground upon which it was actually decided by the Court of Appeal in *Rousou* v. *Photi* that the house did not come within the section of the Housing Act was that the rent, measured by the year, was in excess of £40. But the rent was an inclusive one, and if one subtracted from the rent actually reserved that portion of it which was required to reimburse to the landlord the amount annually expended by him in discharging the rates, the *net* rent so ascertained was less than £40 by the year; so that if the latter was the "rent" referred to by the section, the warranty implied by the Housing Act would apply to the house. It had been held by Atkinson, J., in the Court of first instance (*Rousou* v. *Photi*, [1940] 1 K. B. 299), following *Jones* v. *Nelson*, [1938] 2 All E. R. 171, the case cited in *Woodfall* (24th ed.) at p. 717 (being at that time the only decision on the point) that the rent referred to in the section was, where the rent was an inclusive one, the net rent which actually came into the landlord's pocket after he had discharged the rates. This involved the curious position that a house might have been outside the section one year owing to the net rent exceeding £40 by a small margin, and within the section the following year owing to an increase in the rates payable by the landlord. This anomaly has been disposed of by the decision of the Court of Appeal, reversing Atkinson, J., and overruling *Jones* v. *Nelson*, that the rent spoken of in the section means the contractual rent agreed to be paid by the tenant, whether inclusive of rates or not.

The proper construction of the section is admirably expressed in the judgment of Sir Wilfrid Greene, M.R. He says: "The section requires the existence of a contract. The rent referred to in the section appears to me to mean, and to mean only, the rent

payable by virtue of that contract by the tenant to the landlord. I can see no justification for dissecting that contractual payment and attributing part of it to something which is called the annual value of the house, or of part of the house, and attributing the rest of it to rates or an apportioned sum in respect of rates. It seems to me that the Legislature has taken, for reasons no doubt thought good by it, a simple and clear test about which nobody could be confused—namely, the actual contractual rent paid by the tenant to the landlord."

The obligation arising under the section is purely a contractual obligation between the landlord and the tenant, and does not enable the tenant's wife or any other stranger to the tenancy to sue for damages (*Cameron* v. *Young*, [1908] S. C. (H. L.) 7; *Middleton* v. *Hall* (1913), 108 L. T. 804; *Ryall* v. *Kidwell*, [1914] 3 K. B. 135). But so far as the tenant is concerned, a breach on the part of the landlord entitles him to quit without paying rent if the condition be broken and to sue the landlord for damages if the undertaking be broken (see, as to damages, *John Waterer, Sons & Crisp, Ltd.* v. *Huggins* (1931), 47 T. L. R. 305). The standard of repair called for by the implied obligation is to keep the premises "decently fit for human beings to live in", and since this is something less than good tenantable repair the position where the tenant has expressly covenanted to keep in good tenantable repair is that the landlord must maintain the premises up to the standard required by the Housing Act but the tenant is liable for repairs beyond that standard up to the extent of his express covenant (*Jones* v. *Geen*, [1925] 1 K. B. 659). Cases which afford guidance as to the standard of repair required by the Act are *Walker* v. *Hobbs* (1889) 23 Q. B. D. 458 and *Fisher* v. *Walters*, [1926] 2 K. B. 315 (fall of ceiling held a breach); *Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131 (broken window sash cord, *quaere* whether a breach); and *Stanton* v. *Southwick*, [1920] 2 K. B. 642 (rats frequently invading the house, but not actually living and breeding there, not a breach). In any event the statutory obligation applies only to the demised premises and not, for example, to a common means of approach giving access to them (*Dunster* v. *Hollis*, [1918] 2 K. B. 795). The implied condition read into all landlords' covenants for repairs that the landlord shall have notice of the want of reparation applies equally to this statutory obligation (*Morgan* v. *Liverpool Corporation*, *supra*).

It remains to consider the landlord's obligation in respect not of the demised premises but of ancillary portions of the premises where part only of a building is let to the tenant and the landlord

retains control of some other portion. This branch of the law has come into prominence in modern times with the development of the present-day blocks of offices and flats. Almost invariably the roof over the building and the various staircases, lifts and passages affording access to the different offices or flats are not let in whole or in part to any of the tenants but are retained in the possession and control of the landlord, who thus assumes a certain responsibility for their maintenance. Generally speaking the cases on the subject concern either roofs or means of access but quite clearly the principle is not limited to such but extends to anything which is ancillary to the enjoyment of the demised premises, such as water tanks, ventilating machinery and the like, and which is not parcel of the demised premises but is retained in the possession and control of the landlord. In respect of such, a contractual obligation is implied on the part of the landlord into the contract of tenancy, and although the cases on the subject are mostly modern, the obligation is a common law one. Unlike the statutory obligation considered above in respect of the demised premises themselves, this obligation is, in common with all other covenants implied at common law, excluded entirely by an express agreement upon the same subject-matter. Very frequently there is such an express covenant on the landlord's part, as in *Bishop* v. *Consolidated London Properties, Ltd.* (1933), 102 L. J. K. B. 257.

The extent of the landlord's implied obligation is a covenant on his part that he will use reasonable care to prevent the ancillary thing falling into disrepair. His obligation is in no sense an absolute one to maintain it in a safe condition : this has been established by *Hargroves & Co.* v. *Hartopp*, [1905] 1 K. B. 472, and *Cockburn* v. *Smith*, [1924] 2 K. B. 119, rejecting *Hart* v. *Rogers*, [1916] 1 K. B. 646. So in the case of a staircase the landlord's duty is to use reasonable care to keep the staircase reasonably safe (*Dunster* v. *Hollis*, [1918] 2 K. B. 795). But as to the kind of approach provided, there is no obligation to provide any better kind than the tenant has agreed to accept. If the means of access when a flat is let is a staircase without a balustrade, the landlord's implied obligation, while extending to the maintenance of the existing staircase and the repair or replacement of badly-worn steps, does not oblige the provision of a balustrade. To take the classic example given by Buckley, L.J., in *Dobson* v. *Horsley*, [1915] 1 K. B. 634, if the means of access provided when the tenancy was entered into was a plank with no handrail across a stream, the landlord's duty is not to provide some better means of access but to use reasonable care to keep the plank in a reasonably safe condition. The landlord will be restrained from removing a means of

access provided for the use of the tenant at the time the premises were let (*Allport* v. *Securities Corporation* (1895), 64 L. J. Ch. 491).

It has already been mentioned that the obligation is a contractual one, which means that only the tenant is entitled to the benefit of it. As regards lodgers, members of the tenant's household, friends and persons having business with the tenant, all such persons while using or enjoying the staircase or other ancillary thing occupy the position of licensees of the landlord and the landlord's duty to them is accordingly limited to a duty in tort to warn them of any hidden peril of which he knows or ought to know, and which is not known to the licensee or obvious to the licensee using reasonable care (*Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74; *Lucy* v. *Bawden*, [1914] 2 K. B. 318). The subject of obligations in tort to persons other than the tenant will be considered more fully in Part III of this article. The older case of *Miller* v. *Hancock*, [1893] 2 Q. B. 177, should not be relied upon as an authority, for although the actual decision may perhaps be substantially justified upon the present view of the law having regard to the facts there existing, the principles upon which the decision proceeded are undoubtedly erroneous and overruled by *Fairman* v. *Perpetual Investment Building Society*, *supra*.

An illustration of circumstances which will not amount to a breach of the landlord's obligation is provided by *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217, where a box through which passed water collected from the roof was periodically inspected by the landlord, but despite this precaution injury was caused by rats gnawing a hole in the box. It was held that injury of this kind was not readily preventable and there was no failure by the landlord to exercise the reasonable care required of him. Another interesting illustration of the limitation of the rule is afforded by *Huggett* v. *Miers*, [1908] 2 K. B. 278, where the complaint against the staircase was its defective lighting. It was held that the landlord was not liable in respect of this under the implied obligation now being considered, although the circumstances of a particular case might raise the inference of an agreement to light; but where each tenant lights his own landing no such agreement by the landlord is to be inferred.

The ancillary parts of the building to which this implied obligation relates are only those ancillary things which are essential to the user and enjoyment of the demised premises; there is no implied obligation in respect of a part of the building which the tenant is allowed to use as a matter of convenience merely (*Ivay* v. *Hedges* (1882), 9 Q. B. D. 80).

(c) *War Damage and Obligations to Repair.*

At common law the tenant remains liable upon his covenants, including any agreement upon his part to do repairs, notwithstanding damage caused by the acts of the King's enemies (see *Paradine* v. *Jane* (1647), Aleyn 26; Style 47; and *Redmond* v. *Dainton*, [1920] 2 K. B. 256). But the Landlord and Tenant (War Damage) Act, 1939, s. 1, reverses this rule, even it seems to the extent of forbidding the parties to make a bargain, with their eyes open, that one or other of them shall make good war damage. The Act has already been considered in an article by P. H. Thorold Rogers, Esq., Barrister-at-Law, in Vol. 4 of *The Conveyancer*, at p. 234.

The effect of section 1 of the Act is, as regards leases, that where by the provisions of such (or of any contract collateral thereto) an obligation is imposed to do any repairs to the demised premises, those provisions must be construed as not extending to the imposition of any liability on that person to make good any war damage occurring to the demised premises. It is difficult to see why the landlord should be absolutely debarred from contracting that he will make good war damage, even of a limited kind or value, yet such appears to be the result of this enactment, which takes no account of whether the parties contracted expressly as to war damage, with the peril fully in mind, or whether the agreement as to repairs was in general terms not expressly referring to war damage. And that this sweeping prohibition is actually intended is made clear by sub-section (3) of section 1, which provides that any disposition or contract collateral thereto containing a provision whereunder an obligation to make good war damage as such is imposed on any person, shall have effect as if that provision were not contained therein. The Act says nothing as to any abatement of the rent in consideration of the landlord being relieved from such an obligation, and therefore it seems to follow that except where part of the rent is expressly allocated as consideration for the landlord's obligation to make good war damage, no such abatement can be claimed. Of course the tenant gets the benefit of Part II of the Act if war damage actually occurs. It is to be noted that even an obligation, express or implied, to maintain in repair a roof or other ancillary part of the building retained in the possession and control of the landlord, is within sub-section (3) though not within sub-section (1) of section 1.

Sub-section (2) of section 1 deals with an incidental matter which may arise. War damage may not always destroy the

entire building, and the obligation to repair will remain in force in respect of the residue. But the effect of the war damage may be such that compliance with the obligation to repair is impracticable, or only practicable at an unreasonable cost, or of no substantial advantage to the person entitled to the benefit of the agreement. In such cases the obligation is suspended until the war damage is made good to such an extent that compliance with the obligation is practicable at a reasonable cost and is of substantial advantage to the person entitled to the benefit of it.

Section 2 of the Act introduces a supplementary provision to be implied in leases where the tenant is under an obligation (express or implied) to repair. In the event of war damage the tenant must, as soon as practicable after the damage has become known to him, serve a notice on the landlord stating that the damage has occurred and the general nature of the damage so far as it is known to him. He must also permit the landlord or any person authorised by him, at such times as may be reasonable in the circumstances, to enter for the purpose of ascertaining the extent of the damage and making it good either temporarily or permanently. An implied obligation on the part of the tenant to the above effect is imported into the lease by this section even where the tenant's obligation to repair expressly excludes war damage. In the view of the writer it would have been better had the covenant implied by virtue of this section been made applicable to all tenancies regardless of the question whether an obligation to repair is imposed upon the tenant.

POSTPONEMENT OF THE RIGHT TO REDEEM.

By Edmond H. Bodkin, of Lincoln's Inn, Barrister-at-Law.

The recent case of *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1940] A. C. 613, leaves the law in regard to postponing the right to redeem a mortgage for a fixed period in a very unsatisfactory state.

This case was decided by the House of Lords on grounds applicable only to debentures of a company within the Companies Act, 1929; and the House expressly reserved its opinion as to the general question. Further, the decision of the Court of Appeal, which proceeded on principles differing from those relied upon in former cases on postponement, could have been supported on other

grounds, and the statement of the law therein is consequently not of binding authority.

In order to appreciate the question involved it is necessary to bear in mind the principles underlying the rule against clogging the equity of redemption. These principles are very clearly set out in the judgment of Lord Parker in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A. C. 25. The mortgagor cannot at law redeem until the time specified in the proviso for redemption, which usually coincides with that on which the mortgage money is covenanted to be paid. What may be called his contractual right to redeem then arises; and on failure to exercise it, there arises an equity to redeem, notwithstanding the specified date is passed. This equity cannot be clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction, *e.g.*, an option to purchase the property exercisable after the specified date.

Equity, however, regards a right of redemption as a necessary element in a mortgage transaction, and will, therefore, in certain cases grant relief also against the contractual right to redeem. That oppression was the ground upon which the Court interfered in such cases, as well as in those where there was a clog in the strict sense, is well shown by the case in 2 Eq. Ca. Abr. 600, and was accepted by the House of Lords in the *Knightsbridge Estates Case*, *supra*. It is also shown clearly by the judgment of Lord Nottingham in *Newcomb* v. *Bonham* (1681), 2 Free. 68, where it was said that being once redeemable and once a mortgage, negative words should not make it otherwise; if it was suffered, the scriveners would quickly get their way and cozen mortgagors out of their estates.

When, therefore, the contractual right is illusory, as in *Fairclough* v. *Swan Brewery Co., Ltd.*, [1912] A. C. 565, where there was a covenant to pay the mortgage money by instalments whereof the last was not payable until six weeks before the expiration of the mortgaged lease, equity will allow redemption on proper terms. It seems, however, that the contractual right to redeem may be postponed, *e.g.*, in a mortgage to secure a debt payable at a future date, beyond the expiration of a lease of part of the mortgaged property, or beyond the date when a mortgaged policy falls in and becomes payable to the mortgagee (see *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, *supra*, at p. 53; *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1939] Ch., at p. 462).

Again, the Court will interfere as against the legal right to redeem when that right is limited to a particular class. Thus, in

Howard v. *Harris* (1681), 1 Vern. 33, redemption was allowed after the mortgagor's death without issue where there was a covenant to pay in six months, but the right of redemption was confined to the mortgagor and the heirs male of his body.

There is an exception to the rule in the case of mortgages to secure life annuities, or to indemnify against contingent charges, or other objects not capable of immediate pecuniary valuation; redemption being impossible until the thing intended to be secured has been performed (see *Fleming* v. *Self*, 3 De G. M. & G. 997, 1024).

In some cases also the transaction may be enforced as being something other than a mortgage, *e.g.*, a conditional purchase or a family arrangement, as in *Newcomb* v. *Bonham*, *supra*.

The question which arose in the *Knightsbridge Estates Case*, *supra*, was whether a mere postponement of the right to redeem fell within the rule.

Postponement, of course, generally affects the contractual right to redeem, and is not strictly a clog on the equity; though it prevents the latter arising, and it is theoretically possible to have a postponement affecting only the equitable right. The Courts, however, interpreted the principle that the mortgagor is entitled to redeem notwithstanding any stipulation to the contrary as meaning that he is entitled to do so free from all restrictions as to time, and they applied it to cases of postponement of the contractual right. They considered, therefore, that on principle any postponement was void, but that, if it were reasonable having regard to all the circumstances, it would be permitted as an exception to the general rule (see *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620, 626).

In several cases postponement for a fixed period has been upheld; it is well settled that seven years is reasonable; and, indeed, such a period has received statutory confirmation in section 10 (1) of the Trustee Act, 1925; and there appears to be no reported case in which mere postponement has been held invalid. But the absence of a reciprocal covenant on the part of the mortgagee not to call in the mortgage has been regarded as an important consideration in estimating the reasonableness of the period; and circumstances such as the position of the mortgagor, covenants against dealing with the equity of redemption, or the imposition of a "tie" in a mortgage of a public-house, may be of weight.

Thus, in *Morgan* v. *Jeffreys*, *supra*, an hotel was mortgaged to a brewer, the deed containing a covenant for payment in six months and the usual proviso for redemption; a proviso that the

mortgagor (who was a miner of no education) should not be entitled to pay off the principal for twenty-eight years without the consent of the mortgagee; and a "tying" covenant for thirty-one years. There was also a power of sale (described by Joyce, J., as "of a somewhat extraordinary character") exercisable (*inter alia*) on the mortgagor without consent assigning, underletting, demising, charging, encumbering or parting with the possession of the mortgaged premises, and enabling the mortgagee to require the purchaser to enter into a similar "tying" covenant with him. It was held that the period of twenty-eight years was, having regard to all the circumstances, unreasonable, and that the mortgagor was entitled to redeem without reference to it.

In *Davis* v. *Symons*, [1934] 1 Ch. 442, there was a mortgage of land and an endowment policy, with an express proviso for redemption of the latter on payment in six months; a covenant by the mortgagee not to require payment until the expiration of twenty years, or until the death of the mortgagor, which should first happen; a covenant by the mortgagor not to pay off for a like period; and a covenant not to sell the equity of redemption except to a responsible person. The policy matured eight days before the period of twenty years expired. There was a further charge on similar terms on the same property together with another policy maturing prior to the end of the period, and which provided for payment of the policy moneys with profits to the mortgagee.

Eve, J., though he was not prepared to say that twenty years, where there was mutuality and the parties were of an age and competency to decide what was beneficial to them, was unreasonable, held that, having regard to the facts that the mortgagee would receive a considerable sum in payment off during the suspensory period when the policy matured, that the policies were in effect irredeemable, and that the proviso as to selling the equity of redemption hampered the mortgagor to an unreasonable extent, held the contract to be one on which the mortgagee could not insist.

In the *Knightsbridge Estates Case*, *supra*, a large number of freehold properties in London were mortgaged by demise by a limited company to a friendly society to secure a very large loan. The company covenanted to repay the advance by eighty half-yearly instalments of principal and interest combined, and there was a proviso that the whole principal and interest remaining unpaid should become immediately payable on default in payment of any instalment; and there was a proviso that if there was no breach of covenant, the society should accept payment by such instalments. It was also provided by the mortgage that the

society should be able to exercise its statutory powers not only on breach of any covenant by the company, but also if the company should sell the equity of redemption or any part thereof without the consent in writing of the society; such consent not to be unreasonably withheld. There was no provision requiring the society to concur in sales by the company, and consequently, so long as any instalments remained unpaid, the company could not, in effect, sell any part of the property except by finding the whole of the outstanding debt. The statutory power of leasing was also not to be exercised without consent, such consent not to be unreasonably withheld.

Luxmoore, J. (as he then was), held (1) that the period of postponement taken together with the other provisions in the mortgage was onerous and unreasonable and a clog on the equity of redemption, and that the company was entitled to redeem on payment of principal, interest and costs; (2) that the term for repayment did not infringe the rule against perpetuities, which had no application to mortgages; (3) that the mortgage was not a debenture.

The Court of Appeal held that, even assuming the period of postponement must be reasonable in order to be valid, it had not been shown to be unreasonable, having regard to the sum advanced and the facts (which the Court was entitled to go outside the deed to ascertain) as to the negotiations for the loan and the position of the parties. "Reasonableness", however, was not the true test. Postponement was not strictly a clog on the equity of redemption, being concerned with the contractual right to redeem. Any provision which hampered redemption after the contractual date was passed would not be permitted. Further, a right of redemption was an essential element in a mortgage transaction, and where the contractual right to redeem was illusory (as in *Fairclough* v. *Swan Brewery Co.*, *supra*) equity would grant relief by allowing redemption. But there was nothing in the postponement in the present case which was inconsistent with the essential requirements of a mortgage. Nor was the contract as a whole so oppressive and unconscionable that it ought not to be enforced in a Court of equity. These were the only two grounds on which equity would interfere to reform such a contract.

The Court of Appeal accordingly reversed the judgment of Luxmoore, J., on the first point, expressing no opinion on the third point, which on their view of the law it was unnecessary to consider, but agreeing with the learned Judge on the second point.

The Court was able to distinguish the previous cases in which postponement clauses had been held to be void on the ground of

unreasonableness, on the ground that there was in each of them some other element on which the decision could be supported. Thus *Morgan* v. *Jeffreys*, *supra*, and *Davis* v. *Symons*, *supra*, could both be supported on the ground that the provisions for postponement were devices to fetter the contractual right to redeem. The Court appears to have regarded these provisions as analogous to the provisions preventing a real contractual right to redeem from arising which were considered by Buckley, J. (whose views were not accepted on appeal) in *Lisle* v. *Reeve*, [1902] 1 Ch., at pp. 68, 72. The judgment, of course, throws no doubt upon the validity of the form adopted in conveyancing precedents, whereby the covenant for payment in six months with a proviso for redemption or cesser (express or implied) is qualified by a subsequent provision for postponement. It cannot be suggested, as pointed out by Ronan, L.J., in *Re Fortescue's Estate*, [1916] 1 Ir. R. 268, 279, that there is any repugnancy in such a clause; though it may in some cases be difficult to determine when the postponement clause constitutes a device to prevent redemption, designed, *e.g.*, to secure performance of a "tying" covenant as in *Morgan* v. *Jeffreys*, *supra*. Where there is a covenant for payment by instalments the question cannot arise.

The effect of the above judgment is to render this branch of the law more logical and consonant with business realities. It represents a further step in the process of reducing the law to a logical system which may be said to have commenced with the judgment of Lord Parker referred to above. The doctrine of clogging the equity of redemption is, in fact, as pointed out by Lord Mersey in *Kreglinger* v. *New Patagonia, etc., Co., Ltd.*, *supra*, in a picturesque phrase "like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be". It seems, therefore, a pity that the law should not have been authoritatively laid down by the House of Lords. As pointed out at the commencement of this article, it appears to be doubtful what is the true test to be applied in cases of postponement. In any case the test laid down by the Court of Appeal would not, it seems, apply to equitable mortgages, where the contractual right to redeem is itself subject to the equitable jurisdiction of the Court. And it does not apply to mortgages by clients to their solicitors, as in *Cowdray* v. *Day*, 1 Giff. 318; or, it seems, to other cases of fiduciary relationship; in such cases the unreasonableness of the period may alone be ground for relief. Redemption may also be postponed indefinitely by a subsequent separate and independent agreement.

Lastly, we must consider the judgment of the House of Lords.

The House held that the mortgage was within section 74 of the Companies Act, 1929. Although an ordinary mortgage of land by a limited company was not within section 103 of the Companies (Consolidation) Act, 1908 (now replaced by section 74 of the Act of 1929), which permitted the issue of irredeemable debentures, it was brought within that section by the addition to the interpretation section of the words " bonds and any other securities of a company, whether constituting a charge on the assets of a company or not ". These words were added originally by section 285 of the Companies Act, 1928, and not by section 380 of the Companies Act, 1929. The former Act was not, like the latter, merely a consolidating statute, and therefore the objection of Luxmoore, J., who thought the words in question were added by the latter Act and should not be construed as altering the law, was not well founded. There was no context requiring a different construction. As Lord Romer pointed out, no one knew exactly what a debenture was, and consequently " other securities " could not be construed as *ejusdem generis* with " debentures ". Viscount Maugham also pointed out that the foundation of the Court's interfering against the contractual right of redemption was oppression. But loans to limited companies were very different from loans to individuals. There was no likelihood of oppression; and consequently debentures whether irredeemable, or not redeemable for a long period, or redeemable only on a contingency ought to be given validity; and this applied, though with less force, to debentures not forming one of a series. The mortgage in question might easily have been drafted in the form of a debenture. The rule against perpetuities did not apply to mortgages; but not for the reason suggested in argument, that a postponement of redemption for more than twenty-one years would in any case have been invalid as a clog.

Section 74 of the Companies Act, 1929, left it open to the Court to interfere in cases of oppression, but there was nothing in the facts of the present case to justify relief. The House of Lords accordingly dismissed the appeal.

The result of the decision is, of course, that all mortgages by companies within the Act, whether of real or personal property, are within section 74 and may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long. But it is still the law that a company cannot issue perpetual debentures unless it has the requisite power in its memorandum of association (see *Re Southern Brazilian Rio Grande do Sul Ry.*, [1905] 2 Ch. 78).

THE EVIDENCE AND POWERS OF ATTORNEY ACT, 1940.

By B. A. Bicknell, of Lincoln's Inn and Middle Temple, Barrister-at-Law.

The Evidence and Powers of Attorney Act, 1940, is the second statute passed during this war dealing with powers of attorney executed by persons on war service or out of the jurisdiction.

The first, the Execution of Trusts (Emergency Provisions) Act, 1939, extended the powers of trustees, personal representatives and tenants for life on war service to delegate their powers and supplements section 25 of the Trustee Act, 1925. Section 3 of the Act of 1940, which is the section dealing with powers of attorney, has a different object. It is not an enabling section, as was the Act of 1939, extending powers of delegation. It is, on the contrary, an Act restricting such powers, as it imposes certain formalities on the execution of instruments creating powers of attorney by persons in the armed forces abroad and by British subjects in enemy territory.

It was felt with tens of thousands of soldiers abroad that many would require to execute powers of attorney. As it would be practically impossible for persons dealing with an attorney, who claimed to be acting under such a power, to check its due execution a serious risk of fraud existed. The alleged donor of a forged power would not be prejudiced by the activities of a person claiming to be the donee thereunder, but third persons might suffer severe loss without any hope of redress. Section 3 of the Act of 1940, by introducing formalities in the execution of powers, is intended to curtail so far as is reasonably possible this risk of fraud.

Section 3 must be borne in mind by conveyancers both when settling powers of attorney and in considering powers executed after June 13, 1940, the date when the Act came into operation. For no power falling within the scope of section 3 is of any effect unless it complies with the requirements of the section. It is, therefore, necessary in every case to see that the requirements of the section are fulfilled or that it does not apply.

Section 3 is of limited scope. Sub-section (5) provides: "This section applies to instruments executed after the commencement of this Act during the war period either—(a) outside the United Kingdom by a member of His Majesty's naval, military or air forces, or a person engaged in the nursing service or other auxiliary

service of any of those forces; or (b) by a British subject in territory which is under the sovereignty of, or in the occupation of, a Power with which His Majesty is at war, not being territory in the occupation of His Majesty or of a Power allied with His Majesty."

The formalities imposed by the section are set out in sub-section (1) which provides that: "No instrument creating a power of attorney, being an instrument to which this section applies, shall be of any effect unless it is attested by at least one witness and unless and until the instrument either—(a) has been deposited in the central office of the Supreme Court under section two hundred and nineteen of the Supreme Court of Judicature (Consolidation) Act, 1925"; or alternatively, the sub-section provides for registration in Scotland in the books of council and session and in Northern Ireland for deposit in the proper office of the Supreme Court.

Sub-section (2) contemplates that rules of Court will be made controlling the deposit or registration of the power. It provides: "Rules of court may provide that no instrument to which this section applies shall be deposited or registered as aforesaid unless it is presented by a solicitor and there is produced at the time of its presentation—(a) an affidavit sworn by that solicitor proving that he caused the instrument to be engrossed and sent to the donor for execution and that he believes that the signature of the person executing the instrument as the donor is the signature of that person; and (b) an affidavit verifying the execution of the instrument, sworn by the attesting witness or one of the attesting witnesses: Provided that no rule made by virtue of this sub-section as respects the Supreme Court shall apply to an instrument creating a power of attorney under section one of the Execution of Trusts (Emergency Provisions) Act, 1939, or any corresponding enactment of the Parliament of Northern Ireland."

As yet no rules of Court have been made under the power conferred by this sub-section. It is perhaps as well that this has been the case for, if such rules followed closely the lines of the sub-section, they would, it seems, unduly hamper the execution of powers both by persons on active service and prisoners of war who fall within sub-section (5) (b). While a prisoner might be able to execute a power drawn by himself and send it to this country, it would generally not be possible to send to him a power for execution and to get back both the power and an affidavit of the attesting witness verifying its execution. It is reasonable that proper steps should be taken to see that only duly executed powers are deposited or registered, but the manner of proving such

execution should be left elastic so that valid powers may be deposited on whatever satisfactory proof of execution is available.

Section 4 of the Act of 1940 facilitates the proof of the execution of powers within the Act by providing that an office copy of an instrument within the Act deposited in the Central Office or in the Supreme Court in Northern Ireland or an extract from an instrument registered in Scotland "shall, in any part of the United Kingdom, without further proof be sufficient evidence of the contents of the instrument and of the fact that it has been so deposited or registered".

It is clear that the effect of section 3 of the Act of 1940 is that persons dealing with attorneys now have to satisfy themselves that the requirements of the section have been fulfilled or that the power of attorney in question does not fall within the scope of this section. The greater number of powers will not be within the section at all. The section recognises that there may be difficulty in proving that it does not apply and sub-section (3) provides: "A statement in writing by the donor of a power of attorney (whether or not contained in the instrument creating the power) that the instrument creating the power is not an instrument to which this section applies shall, in favour of a person dealing with the donee of the power, be conclusive evidence of that fact."

Sub-section (3) is of very considerable importance as, if advantage is taken of its provisions, it is possible to ignore section 3 entirely where a power is executed by a person who does not fall within sub-section (5).

It follows that all powers of attorney to which section 3 does not apply should contain a recital stating that the instrument is not one to which the section applies. A form of such recital is to be found with the precedents, *post*, p. 378. Where such a recital has not been inserted the donor should endorse such a statement on the power and sign it.

Where such a statement in writing has not been made by the donor, any person dealing with the attorney must insist that one be obtained, unless he can produce other satisfactory evidence that section 3 of the Act of 1940 does not apply.

BENEFICIAL OCCUPATION.

By J. A. Coutts, M.A., LL.B., Barrister-at-Law.

" It is not to be denied ", said Denman, C.J., in 1836, " but that this phrase ' beneficial occupation ' has been in frequent use; and, generally speaking, it serves tolerably well to convey rather a popular notion, than to give a certain rule for deciding the question of rateability in every instance " (*a*). What was a popular notion in 1836 has in the course of a century become a highly technical expression, the present interpretation of which, it is submitted, now frequently works hardship. For over thirty years, it would appear to have been generally accepted that " the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established " (*b*). On this principle it is claimed that one period of actual user may be linked to another period of actual user by the intention of the occupier, at the time of the first period of user, to use the property at some time in the future. In such circumstances, the occupier will be rateable for the intervening period of non-user.

It is submitted that the general proposition of Collins, M.R. (*sup.*) needs limitation, although it has apparently been universally accepted. For example, in *Ryde on Rating* (6th ed.), p. 22, in spite of the condemnation of Collins, M.R.'s logic, the learned editor appears to have accepted the principle that occupation depends on intention, when he states (p. 17) that " ownership of an empty house or other building (for the moment not in use) coupled with the intention on the part of the owner to make use of it in the future, if opportunity offers or occasion arises, amounts to occupation " (*c*). But this statement as it stands is, it is submitted, too general : it can apply only to those cases in which the premises have already been occupied at some period in the past; it cannot apply to cases in which the owner is intending to

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(*a*) *Governors of the Bristol Poor* v. *Waite*, 5 Ad. & E. 1, 8. A century ago, the term was by no means precise—*e.g.*, in *Newling* v. *Pearse* (1823), 1 B. & C. 437, " legal occupation " and possession appear to be equated by Holroyd, J., who held that " in a sense lands may be said to be unoccupied if the person entitled to the possession takes no means to make the land beneficial to himself. But although he did no acts of ownership, he may still have been in legal possession and occupation of it ".

(*b*) *Per* Collins, M.R., in *R.* v. *Melladew*, [1907] 1 K. B. 192, at p. 201.

(*c*) Contrast *Hackney B. C.* v. *Metropolitan A. B.*, 40 T. L. R. 645, with *L. C. C.* v. *Hackney B. C.*, [1928] 2 K. B. 588.

occupy for the first time, for here rateability obviously dates from his user not from his intention (*d*). Evidence of the alleged occupier's intention will, of course, always be an important factor in establishing actual occupation and will, in some cases, exempt from rateability a person actually occupying the hereditament. Thus, the travelling showman mentioned by Lush, J., in *R.* v. *St. Pancras* (*e*) is not rateable, because "he comes into a parish with the intention to remain there for a few days or a week only". But it is submitted that intention alone can never be the governing factor in occupancy. To take a case that must have been of frequent occurrence: the occupier of "seasonal property" uses his premises during the summer of 1939; in September 1939 he intends to resume user from the beginning of the next summer, but in June 1940 changes his mind, on finding that because of the war it is not worth his while to resume user; is he to be rateable from the end of the summer of 1939 until his change of mind? Obviously not. Thus, rateable occupation should depend not on intention but on the carrying out of that intention.

Historically, the doctrine that the intention of the alleged occupier is a governing factor in determining the question of rateable occupancy appears to rest on two grounds, one of which is clearly a misunderstanding of the earlier authorities and the other of which is, it is submitted, fallacious.

(a) As stated by Collins, M.R., in *R.* v. *Melladew* (*f*), the rule is based on a misreading of a statement by Blackburn, J., in *Allan* v. *Liverpool* (*g*). In *Allan's Case*, the appellants, a shipping company, were, under the terms of an agreement made with the Mersey Docks and Harbour Board, using one of the docks. The question at issue was: Which of the parties to this agreement, Messrs. Allan or the Docks Board, was in rateable occupancy of this dock? It was in these circumstances that Blackburn, J., examined the intentions of the parties to the agreement "to see whether an exclusive possession of the premises had been parted with" by the Docks Board, in such a way as to make the appellants (and not the Docks Board) rateable. Such intention, therefore, was relevant to deciding *who* was in occupation, it being

(*d*) In the case where the house is in the course of construction, the reason for this is clearly stated in Faraday on Rating (4th ed.), p. 20: "Property during construction is not rateable, and although there is occupation of land during the construction of a house, there is no 'beneficial occupation'; therefore the builder or owner of such incomplete building is not liable."

(*e*) (1877), 2 Q. B. D. 581, 588. Logically, there is no reason why the showman should not be rateable for the period of his stay. Lush, J.'s, statement that he is exempted because imposition of rateability upon him would entail his paying rates for the full period for which the rate is made is (and was) clearly wrong.

(*f*) [1907] 1 K. B. 192, 201.

(*g*) (1874), L. R. 9 Q. B. 180, 192.

admitted that *somebody* was. In *Melladew's Case*, however, Collins, M.R., takes Blackburn, J.'s *dictum* that " we must look to the intention of the parties " out of its context, for in *Melladew's Case* the only point at issue was one which had never been before the Court in *Allan* v. *Liverpool* (*h*). In *Melladew's Case*, a firm of warehousemen alleged that they had closed their warehouse and that therefore no one was in rateable occupancy of it, thus leaving the Court to decide not *who* was in occupation but whether *anybody* was. It was in determining this problem by examining the intentions of the warehousemen as to their *future* use of the warehouse, that Collins, M.R., formulated the doctrine that the alleged occupier's intention *in futuro* is a governing factor in establishing rateable occupancy (*i*).

(b) As stated by Buckley, L.J., in *Liverpool Corporation* v. *Chorley Union* (*k*), the doctrine appears to be based upon the fact that " there are many cases in which the owner has no need to go, and does not go, upon the land ", so that " the fact that the alleged occupier is not physically upon the property either in person or by works done or chattels placed upon the property, is not necessarily the test " of rateable occupancy. This is undoubtedly so; and in such cases as these the intention of the alleged occupier must be a governing factor : but the ' intention ' in such cases is nothing more than a present intention to occupy the property at the time during which occupation is alleged. It is submitted that it is impossible to deduce from the necessity of intention in such cases a general rule to the effect that, if an alleged occupier intends to occupy in the future, he is to be held to be in occupation at the time of his intention.

But the doctrine, historically inaccurate and illogical though it

(*h*) Or indeed in any of the earlier cases in which the Court had examined the intentions of the parties in order to establish rateability. *Allen* v. *Liverpool* (*sup.*), on which Collins, M.R., purported to base his general principle, was, of course, by no means the earliest instance of a Court looking at the intentions of the parties for this purpose. Blackburn, J., himself had adopted the same procedure in at least two earlier cases: *Smith* v. *St. Michael's, Cambridge* (1860), 3 E. & E. 383, and *R.* v. *St. George's* (1871), L. R. 7 Q. B. 90; and a much earlier example is to be seen in *Lord Amherst* v. *Lord Sommers* (1788), 2 T. R. 372. The same arguments were adopted in other than rating cases, *e.g.*, *Crosby* v. *Wadsworth* (1805), 6 East 602 (to determine whether exclusive possession had been parted with) and in the franchise cases where the Courts had to decide whether the occupier of part of a house was separately rated, so as to entitle him to the franchise: see, *e.g.*, *Cross* v. *Alsop* (1870), L. R. 6 C. P. 315, where the earlier cases are cited. The question which of two alleged occupiers is in rateable occupation is one of very frequent occurrence; *e.g.*, *R.* v. *W. Derby Area A. C.*, [1939] 1 K. B. 173, where the Court appears to have acted on the assumption that there could be two separate occupiers of the same premises (*per* Lord Hewart, C.J., at p. 180, and Charles, J., at p. 181).

(*i*) This misunderstanding is dealt with in Ryde on Rating (6th ed.) on p. 22, where further objections to the doctrine of intention are advanced.

(*k*) [1912] 1 K. B. 270, 287.

be, appears to be generally accepted, so that it may be stated that a person may be held to be in occupation because there is evidence that he intends to use the property in the future. The rating authority, therefore, must prove either (a) that at the end of the first period of user the alleged occupier intends to recontinue this user at some future date or (b) that at the end of the first period of user he has already a fixed intention of using the property at a future date. Unless one of these things be proved, there can be no rateable occupation, even though the owners enter on the property to do what is necessary to preserve it from deterioration. Thus, if the owner of a piece of waste land at the seaside uses this land as a car-park during the summer season but finds that the money taken does not cover the cost of its collection, he may decide at the end of the season to leave the land vacant during the following season; but if an exceptional offer is made to him at the beginning of the next season and he uses his land once more, it is submitted that he should not be rateable for the intervening period.

Is the operation of the doctrine of intention satisfactory in practice? The Lord Chief Justice has stated (*l*) that "it is not difficult to say, in a particular case, on which side of the line that case falls"; but with respect it is submitted that the professional advisers of alleged occupiers may frequently be at a loss in forecasting for their clients whether the Court will hold that the facts are sufficient to support the allegation that the alleged occupiers intend to use the property in the future (*m*). The result is that many clients will prefer to pay rates rather than face what is undoubtedly a risk in taking action in the Courts (*n*). Thus, the doctrine leads to uncertainties and anomalies and frequently works hardship.

On what principle is it to be determined whether in the case of unused premises a case is on one side of the line or the other? Wherein lies the distinction between (a) those cases, exemplified by the *Bootle Case* (*o*), in which it is held that there is an absence of

(*l*) *Hackney B. C.* v. *M. A. B.*, 131 L. T. 136, at p. 139.

(*m*) *E.g.*, it was stated by Wright, J., in *L. C. C.* v. *Hackney B. C.*, [1928] 2 K. B. 588, 596, that in the above case "beneficial occupation was established from an 'accumulation of facts' each of such facts being 'one of small but not negligible moment'".

(*n*) An instance of an owner of seaside property in circumstances such as those mentioned above recently came to my notice. An optimistic circus proprietor (whose optimism later led to his bankruptcy) offered £300 for the use of vacant land for three months; whereupon the rating authority imposed a rate (with this figure as the annual rent) and levied the rate for the whole year. Although he had no intention of using the property (which was land awaiting building development) during the subsequent season, the owner preferred to abandon the case after the assessment committee had sanctioned the rate, rather than risk an appeal.

(*o*) *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1901), 65 J. P. 740; cf. *L. C. C.* v. *Hackney B. C.*, [1928] 2 K. B. 588.

any intended or contemplated user and (b) those cases, exemplified by *Melladew's Case* (*p*), in which such intention of future user is proved? The distinction has been stated by Wright, J. (*q*) to lie in the fact that in (a) "there was no employment for which the premises were suited; their future employment was uncertain and under deliberation and they could not be made ready for any probable prospective employment without elaborate re-equipment", whereas in (b) "the premises were kept ready for definite employment and this was what was contemplated and intended, and was the reason why they were acquired".

There are at least two difficulties inherent in this distinction. The first is that of drawing a conclusion from the facts in any case in such a way as to place that case clearly on one side of the line. The Lord Chief Justice admits (*r*) that "it is easy to suggest analogies and to postulate cases near the line, nor is it difficult to point to decisions apparently in conflict"; and it is not entirely satisfactory to the practitioner to know that the sole method of reconciling the apparent conflicts is to be found in the fact that "all such decisions must be read *secundum materiam subiectam*". But there is a more vital difficulty which arises from the principle itself. The distinction between the Liverpool Warehousing Company and Melladew (both of whom closed their warehouses) appears to be nothing more than that the Liverpool Warehousing Company stated that their intention was "to withdraw the property absolutely from their trade" until an opportunity for trading offered, whereas Melladew's "continuous intention was to utilise the premises for the purposes of his business whenever opportunity offered" (*s*). Is there any distinction between these intentions? Both are present continuous intentions to act in a certain way in the future if a certain condition is fulfilled, the fulfilment being in both cases uncertain. For example, if the Liverpool Warehousing Company had at any time had an exceptionally good offer, they certainly would have been prepared to use their premises (*t*). The distinction, it is submitted, entails a confusion between intentions, hopes and expectations. Melladew, whose expectations or hopes of a trade revival are good, pays rates; the Liverpool Warehousing Company, whose expectations or hopes of such a revival are slight, pay no rates. This appears to put an unnecessary premium on commercial pessimism.

(*p*) *R.* v. *Melladew*, [1907] 1 K. B. 192; cf. *Borwick* v. *Southwark Corporation*, [1909] 1 K. B. 78.
(*q*) *L. C. C.* v. *Hackney B. C.* (*sup.*) at p. 595.
(*r*) *Hackney B. C.* v. *M. A. B.* (*sup.*) at p. 139.
(*s*) *Per* Collins, M.R., in *R.* v. *Melladew* (*sup.*) at p. 202.
(*t*) In fact, they continued to advertise "Storage to Let".

It may be that many of the difficulties of establishing rateable occupation have arisen from the Courts' hesitancy in deciding whether occupation is a question of law or a question of fact and from their refusal to crystallise the circumstances in which rateable occupation can be established. In *Borwick* v. *Southwark Corporation* (*sup.*), Bigham, J. (at p. 84), following the *Bootle Case* (*sup.*), but ignoring the decision in *Melladew's Case* (*sup.*) that occupation is a question of mixed fact and law, stated : " Cases of this kind depend much more on fact than on law. Whether a man ' occupies ' or not is in each case a question of intention to be ascertained with reference to the particular circumstances and if there are facts which one way or the other can reasonably support the conclusion at which the justices arrive, I do not think that this Court should interfere with that conclusion. It is a finding of fact. . . . Occupation is, and always must be, a mere question of fact which may involve a question of intention, and the only question of law is whether there is evidence which can reasonably support the finding whatever it may be." But this statement was criticised by Kennedy, L.J., in *Liverpool Corporation* v. *Chorley U.* (*u*) on the ground that it gave " rather too much weight to the decision of the justices ". In the course of the argument in that case, the learned Lord Justice had stated (at p. 279) that " the question whether certain facts did or did not exist was, no doubt, for the Sessions, but the inference from those facts would appear to be a question of law ". In *Hackney B. C.* v. *M. A. B.* (*x*), however, Lord Hewart, C.J., considered that all difficulties have arisen out of the facts of each case and that it would be no solution to the problem to define " occupation " as a matter of law. " There is no statutory definition of the word ' occupation ', but it has been commented on and explained in a great number of cases. In them, many valuable suggestions are made, and rules laid down, but it must be remembered that the decision in each case largely depends on the facts peculiar thereto. . . . It is not, perhaps, possible, certainly it is not desirable to lay down any definition of the word ' occupation ' or to crystallise the circumstances necessary to fulfil the definition. . . ." (*y*).

(*u*) [1912] 1 K. B. 270, 291.

(*x*) (1924), 131 L. T. 136, 139.

(*y*) This attitude was adopted by the Courts in cases arising under the Betting Act, 1853; *e.g.*, *per* Channel, J., in *Brown* v. *Patch*, [1899] 1 Q. B. 892, 899: ' With respect to the decisions which have been cited to us, the question in each case being, What is the proper inference to be drawn from the particular facts? although it is useful and valuable to see what inferences learned Judges have drawn from particular facts in cases which have come before them, their decisions are not quite like binding decisions on a point of law. The question, after all, is a question of fact in each case."

It is stated in *Ryde on Rating* (6th ed.), p. 23, that Wright, J. (*z*), has indicated the limits of the doctrine of intention in the following words :

> " The relevant intention must, I think, have regard to the employment of the premises in the rating year, and to an employment to which they were suited or were readily capable of being suited in their actual condition. This was the ground of the decision in the [*Bootle Case* (*sup.*)], which turned on a finding that in the rating year there was no intention to use the premises. This is quite different from keeping the premises definitely and intentionally in reserve for purposes for which they are prepared. In such cases, the contemplated and intended user is being enjoyed. . . ."

It appears to be implicit in this statement that rateability depends upon user, even in those cases to which the doctrine of intention has been applied. But what is meant by this enjoyment of " the contemplated and intended user ", on which the learned Judge bases rateability ? The alleged occupier is not enjoying any actual user of the property; all he is enjoying is his contemplation or intention. This being so, it is submitted that, as the law stands, it is impossible to draw the line between rateability and non-rateability by basing rateability on user.

It is, indeed, precisely this divorce of beneficial occupation from user that has led to certain anomalies in the law of rating. If the owner of land uses it for the construction of buildings thereon, he will not be rateable while the premises are in the process of construction, since no tenant would be prepared to give a rent for land on which partially-constructed buildings stood (*a*). Yet such an owner is putting his land to greater use and is deriving greater benefit from it than is the owner whose land is not for the moment in use, but who is rateable because of his intention to use the land as soon as an opportunity offers. A further anomaly is seen in the contrast between the rule that valuation must be made *rebus sic stantibus* (*b*) and the rule that, when rateability depends on the intention of the alleged occupier *in futuro*, it is based on an assumption of changing circumstances. " No doubt ", says the learned editor of *Ryde on Rating* (6th ed.), p. 22, " the question whether a hereditament is already occupied (and therefore rateable)

(*z*) *L. C. C.* v. *Hackney B. C.*, [1928] 2 K. B. 588, 596.

(*a*) See the quotation from Faraday on Rating in note (*d*) above.

(*b*) " The amount of the rate is controlled, no doubt, by the use to which the owner puts the land: *R.* v. *St. Luke's Hospital*, 2 Burr. 1053; the property is rateable as it is, not as it might be made, but this is a consideration which goes not to rateability but to quantum of rate " : *per* Buckley, L.J., in *Liverpool Corporation* v. *Chorley Union*, [1912] 1 K. B. 270, at p. 288.

is distinct from the question at what amount it is to be valued, if rateable. But it seems anomalous that, on the question of value, it must be assumed that existing conditions continue, while on the question of occupation it may be assumed that they will change."

It is submitted that it would be better if beneficial occupation were more closely allied to user than it is at present. As Lord Davey said in *Powell* v. *Kempton Park*, [1899] A. C. 143, 186, the word "use" is "not a difficult word to construe"; and, in any event, it would certainly be no more difficult to construe than the term "beneficial occupation". If rateable occupation and user were more closely related, it is suggested that both the professional advisers of alleged occupiers and the Sessions would be confronted with fewer difficult questions of fact (*c*).

AN EVENING WITH A POOR MAN'S LAWYER.

By A. L. Samuell.

A Poor Man's Lawyer should be blessed with a sense of humour as well as the desire to render a necessary piece of social service, for his work must be its own reward.

This is not generally recognised by the people who consult a Poor Man's Lawyer. Naturally they see nothing humorous in their difficulties and though some of them are grateful to the P. M. L., who charges them nothing for his advice, he must not expect any of them to credit any lawyer with a strong sense of duty or disinterestedness.

Certainly not a certain lady who appeared to have some grounds for asking for a decree of nullity against her husband. That, however, was not all she wanted, as he had the reputation of being at least a man of money, which is what he dealt in by way of foreign exchange. His wife accordingly withdrew her application to the Poor Persons Committee, who were prepared to take up her case and put it in the hands of solicitors who were expected to obtain a satisfactory order for maintenance as well as the decree of nullity. When after a year they produced neither,

(*c*) It is not suggested that it is either desirable or possible that rateability should be based solely on user. In spite of Lord Davey's statement (*sup.*), the word "use" has occasioned the Courts no small amount of trouble in construing the Betting Act, 1853. And it would always be possible that land might be beneficially occupied by an owner who was not in the ordinary sense using it at all (see Faraday on Rating (4th ed.), p. 11).

the lady sought the help of a P. M. L. who returned her to the P. P. C. in the hope that, notwithstanding her previous ingratitude, they might assist her in her present plight.

Another wife of a different type—she had not like the other lady, gallicised her English name of Mary into Marie—followed with a problem which the lady missionary at a London Police Court had sent her to the P. M. L. to solve.

Mary was married to a man who was a better workman than husband. He could therefore have afforded to pay more than 7s. 6d. a week for each child whom he had left his wife to look after, but Mary had disdained to ask the Court to order him to pay more, preferring to earn her own livelihood, which she did by hard work as a ward maid in a hospital. Mary's husband had kept the home, even if he did not keep his family, but he shortly abandoned this and the new tenant wanted to get rid of the furniture he had left behind. Would his wife please take it away? Or as the lady missionary saw it, could his wife lawfully take it away?

The facts seem to fall considerably short of an *inter vivos* gift or *donatio mortis causa*—so the P. M. L. had to content himself with reminding his client that possession was popularly regarded as nine points of the law and hoping that she would be able to make a home for herself and her children with the furniture she had been asked to remove.

Post hoc, not *propter hoc*, came a sailor boy, who tiring of the sea had run foul of the doctrine of common employment on land. His good looks, but not his ability to work, were prejudiced by his inability to shave as the result of an accident due to the carelessness of a fellow workman, which left him without a remedy either at common law or under the Workmen's Compensation Acts. This advice was all the more unpalatable because he had lost his job through reacting on a subsequent occasion to the misplaced attentions of another workman so forcibly, that his spade cut the latter's foot, and no doubt his fellow workman did get compensation from his employers.

The next applicant had been a client of the P. M. L. for six years, having first consulted him in 1933 and again in 1935 and 1936. Now in 1939 an official of the London County Council whose tenant she was had told her she must find other premises as soon as she could, as those where she carried on her "general stores" business were to be demolished, under a clearance order. She had found other premises not so well situated and at a slightly higher rent but did not know how to let her present landlords know she was going.

A more educated person than this tenant, who could not even write her name, might have had some difficulty in discovering which department of the L. C. C. should be informed, but the P. M. L. felt that if a letter were addressed to the Council giving notice to quit and claiming compensation for disturbance (which the applicant was not encouraged to expect) it would eventually reach the appropriate officers and his client's long established confidence in him might be justified.

Equal confidence was shown by another applicant, though his experience had been limited to one case which the P. M. L. had referred to the Bentham Committee for Poor Litigants to be conducted as a test action.

This applicant had lost most of his clothing and his small amount of furniture had been seriously damaged as the result of a fire in the house where he lived. Was his landlord liable for the damage, which he said amounted to £30, as the fire had occurred through the stupidity and carelessness of a man employed by the landlord to remove a quantity of cardboard boxes from the ground floor or basement of the house, where he worked by the light of an unprotected candle?

The Judge of the Whitechapel County Court said Yes and assessed the damages at £29, which encouraged the client to return to the P. M. L. with two other clients, fellow tenants of his, with exactly similar claims.

But here the P. M. L. had to discriminate.

One of his proposed clients was a council labourer earning £3 15s. a week and having only himself and his wife to keep, so that he did not appear to qualify as a poor person within the meaning of the Rules. The other was a dock labourer who when in work earned £3 a week and whether in work or not had a wife and child to support. He was referred to the Bentham Committee and his case was put in the hands of their honorary solicitor, who had so satisfied the first applicant that he wanted to know if he might send something to the Committee, when the judgment which he had obtained with their assistance was satisfied.

Not all who consult a P. M. L. are so grateful.

One woman whose case had been referred to the Bentham Committee was so disgruntled because her case had not been taken up that she suggested "bribery and corruption" as the explanation (which was really the unwillingness of her doctor to corroborate her complaint against her dentist), and a young man saw no reason why he should not be advised whether selling tips with a guarantee of winners, based on a scientific system, was a lawful means of livelihood. He had previously complained

that he was not receiving full unemployment benefit and had nothing to look forward to in the near future except public assistance, but, as he admitted that all his customers could not be winners, he was not encouraged to pursue his proposed method of escape from these embarrassments, lest it should lead to greater ones.

There remained at the end of the session only an unopened letter addressed to the P. M. L. but this afforded a welcome relief from the dissatisfaction of his last two clients, as it had been written thanking him for securing an *ex gratia* payment, which had completely satisfied someone who had previously consulted him.

Coming, may be, at the end of a long day in his office, the work of a P. M. L. is often tiring and his patience may be put to an unwelcome strain, because the poor are as reluctant as the rich to accept an adverse opinion, and it is even more important in their case to make them realise not only that justice is done but that it shall seem to be done.

Nevertheless, the work is not only worth doing but must be done by individual effort until it becomes a State service here, as it already is in some countries.

THE *CY-PRÈS* APPLICATION OF SURPLUS CHARITABLE FUNDS.

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The *cy-près* principle continues to flourish almost unimpaired by the judicial criticisms which have consistently but in vain accompanied its development. *Re Royce*, [1940] Ch. 514, illustrates a comparatively novel extension of the doctrine not made before, and rarely made in, the present century. In this case the opportunity to reduce this inflated privilege of charitable trusts, although not beyond the powers of a Judge of first instance, was not taken. Simonds, J., denied that the next-of-kin could claim the immediate surplus of funds remaining after the particular charitable object of the testator had been completely provided for. The testator bequeathed a legacy of £1,000 to the vicar and churchwardens of Oakham church "for the benefit of the choir" and further provided that one-fifth share of his residuary estate should be held on trust for the vicar and churchwardens for the

same purpose. Simonds, J., had little difficulty in holding that no personal benefit to the members of the choir was intended but that there was a charitable gift for the advancement of religion by way of maintaining and improving the musical services of the church by means of the choir. On it appearing that the share of residue might amount to as much as £12,000 a scheme was directed, the balance remaining after provision had been made for musical services in the church to be applied *cy-près*.

Cases in which the property disposed of exceeded the cost of fulfilling the charitable object as it was marked out by the donor were the first to be covered by the *cy-près* principle. It is necessary to draw a distinction between two types of surplus. It is the second type with which this article is mainly concerned and which, in one of its variations, is illustrated by *Re Royce*.

(1) *Subsequent surplus.*

If there is a surplus arising from increased income subsequent to the coming into operation of the gift it has been recognised at least since the time of Coke that the surplus may also go to charity. The fact that the donor has not envisaged its possibility is accepted as no reason for not applying the fortuitous excess in the same way as the original income. There are two main variations of this first type of case in the former of which there seems to be no need to rely on the *cy-près* doctrine.

(a) The donor may have given property for a specific charitable purpose and laid down a plan which exhausts the whole of the present income by distributing it in various sums to particular branches of the charity. A subsequent increase of income may be used to extend the charity *pro rata*. Thus, in the leading *Case of Thetford School*, 8 Co. Rep. 130 b, the rents of certain lands dedicated " to charitable uses " were to be paid in named amounts for the maintenance of a preacher, a master and an usher in a grammar school, and a certain number of poor persons. The sums distributed amounted to £35 per annum, the then yearly profit of the land. In holding that a subsequent increase in the rents and profits must be devoted to the objects in the donor's original plan Coke did not reason from the presence of that general charitable intention which has in equity been made to justify most applications of the *cy-près* doctrine. His decision accords with what must have been the actual intention of the donor in dedicating the rents to his particular charities in named amounts : " It appears by his distribution of the profits that he intended the whole should be employed in works of piety and charity . . . if the land had decreased in value, the preacher, schoolmaster etc. and poor people,

should lose; so when the lands increase in value, *pari ratione* they shall gain" (*ibid.*, 131 a). No general charitable intention had to be proved, but the *cy-près* doctrine is nevertheless usually traced back to the *Case of Thetford School*. It may be noted that in *Att.-Gen.* v. *Marchant*, L. R. 3 Eq. 424, where the facts and decision were similar to those in the leading case, Kindersley, V.-C.'s, judgment made no reference to the *cy-près* doctrine or the requirement of a general charitable intention, after it had been argued on behalf of one of the charities that "the doctrine of *cy-près* has nothing to do with a case like this" (*ibid.*, 428).

A somewhat firmer foundation for the doctrine is *Att.-Gen.* v. *Mayor of Coventry* (1700), 2 Vern. 397; Colles 280; 7 Bro. P. C. 236, where, although subsequent surplus rents were used to extend the testator's original objects for whose benefit he had appropriated specified sums which at first exhausted the whole rents, the terms of the trust were not so favourable to the charities' claim as they were in the *Thetford School Case*. As Lord Holt pointed out in a powerful judgment (*a*) which was reserved in the House of Lords, there was no dedication "to charitable uses" as there had been in the previous case. He held that "the land itself is no further charged than with such a sum, if the profits of the lands increase, yet the sum bestowed on the charity shall not" (*ibid.*, 358). Relying on the principle that the claims of the heir-at-law are favoured, he said (*ibid.*, 359): "It is so in law, and I take it that equity shall never extend a man's grant beyond the natural import of it. I would know by what rule, justice, or reason, you can make this a greater sum than what he gives?" This view did not prevail although Lord Holt's judgment, delivered in Chancery, was concurred in by Wright, L.K., as well as by two common law Judges. In reversing the decree in Chancery by only one vote (*b*) the House of Lords established the contrary doctrine that equity leans in favour of charity. Lord Eldon accepted the ruling of the House of Lords in *Att.-Gen.* v. *Mayor of Coventry* as correct, but in praising Lord Holt's learned judgment he pointed out (*ibid.*, 323) that if "older cases had not existed, such a principle would not have been introduced". *Att.-Gen.* v. *Mayor of Coventry* goes further than the *Case of Thetford School* but in both cases the subsequent surplus was used to expand the particular charities which were the direct objects of the donor's generosity. Even in the later case, if any violence was done to the testator's wishes,

(*a*) Printed for the first time 3 Madd. 353 after *Att.-Gen.* v. *Mayor of Bristol* (1818).

(*b*) See *Att.-Gen.* v. *Mayor of Bristol* (1820), 2 Jac. & W. 294, n. 2. The number of lay peers voting on appeals at this date was, of course, large.

which is doubtful, it was almost imperceptible compared to that committed in the name of an artificial "general charitable intention" in succeeding developments of the *cy-près* doctrine.

Although the general rule is to apportion the accretion to the charitable funds *pro rata* among the different objects of the original charitable disposition, it is now accepted that the apportionment is subject to the Court's discretion in special cases to select from the different objects and apply in such proportions as it thinks fit (*c*). Under this elaboration of the *cy-près* principle the donor's intention may easily be departed from.

(b) If it is not possible for the original object of the donor's choice to be expanded beyond the limits he marked out for it, a subsequently accruing surplus may be applied *cy-près* to some other object. If there is a general charitable intention discernible in the disposition it is now held that the subsequent surplus can be withheld from the next-of-kin even though the original charity which the testator intended to benefit cannot be extended. *Re Campden Charities*, 18 Ch. D. 310, C. A., is a familiar example. In this variety of case it is apparent that the testator intends to make an absolute perpetual gift of the whole property to a certain charitable object: such a gift to that object duly takes effect and a later accidental increase in the value of the property is, not unreasonably, prevented from passing to the next-of-kin. Class (1) (b) exemplifies the *cy-près* doctrine in its strict sense.

(2) *Immediate surplus.*

If there is an immediate surplus after carrying out the terms of the donor's gift there is, *prima facie*, less reason for rejecting in favour of charity the claims of the donor's next-of-kin than where the surplus is of later date. It can be argued that the capital has never been appropriated *in toto* to charity but only the amount necessary to give effect to the donor's directions. But the *cy-près* principle nevertheless comes into play. Here also there are two varieties of cases.

(a) The donor may have provided for named amounts out of designated property to be expended on a specific charity or charities and the property may not be exhausted by the payments. It is settled that the surplus will be used to augment the sums appropriated to the specific charity or charities. This was the conclusion reached in *Arnold* v. *Att.-Gen.* (1698), Show. P. C. 22, H. L., apparently the first reported case of the kind: counsel vainly argued that it was not like the *Thetford School Case* as the

(*c*) *Att.-Gen.* v. *Dean and Canons of Windsor*, 8 H. L. C. 369; *Att.-Gen.* v. *Marchant*, L. R. 3 Eq. 424.

rents of the lands devised were "not increased by any subsequent or accidental improvement" and that the claims of the heir are favoured in law. But there is much to be said for Lord Eldon's view of *Arnold* v. *Att.-Gen.*: "That case went on a principle in favour of charities acted upon by this Court in several cases (which, if new, could not, I think, be sustained), *viz.*, that though a particular purpose fails, effect will be given to the general intention" (*d*). It is clear, however, that it is not strictly a case in which a particular charitable purpose failed. Failure of a particular purpose is a well-known occasion on which the *cy-près* doctrine applies, but *Arnold* v. *Att.-Gen.* (1698), Show. P. C. 22, H. L., is a case in which the particular purpose of the testator was carried out but extended in scope by means of the surplus. It is, perhaps, more reasonable and more in accordance with the testator's wishes to make a *cy-près* application when the particular purpose cannot take effect than it is when his purpose duly takes effect.

The principle of *Arnold* v. *Att.-Gen.* has been acted upon and extended in a series of decisions in which Lord Eldon's criticism has been often heard. In the leading case Arnold expressly declared his intention to devote "to charitable uses" the lands out of which he directed the particular sums to be paid (*e*). There is, however, no such declaration of general intention in most of the later cases. *Arnold* v. *Att.-Gen.* has been extended in the same way as the *Case of Thetford School* was extended in *Att.-Gen.* v. *Mayor of Coventry*, as explained above under (1) (a). For example, in *Att.-Gen.* v. *Earl of Winchelsea* (1791), 3 Bro. C. C. 373, *sub nom. Att.-Gen.* v. *Hurst*, 2 Cox 364, there was no such general statement of intention and it was again unsuccessfully argued that there is a vital difference between an immediate and a subsequent surplus. But Arden, M.R., relied on the imperfect analogy of the *Thetford School Case*. A testator left part of his residue for the apprenticing of three children; the amount being more than sufficient for this purpose, the surplus was ordered to be devoted to apprenticing an increased number of children.

It is said that if the gift is a residuary one it is easier to find a general charitable intention sufficient to introduce the *cy-près* principle as it can be argued that the testator meant to die testate with regard to the whole of his property, leaving nothing for his next-of-kin. But this argument for finding a general charitable

(*d*) *Att.-Gen.* v. *Mayor of Bristol* (1820), 2 Jac. & W. 294, 308.

(*e*) Cp. Lord Eldon in *Att.-Gen.* v. *Mayor of Bristol*, *loc. cit.*, and *Att.-Gen.* v. *Skinners Co.* (1827), 2 Russ. 407, 434, 435, and Shadwell, V.-C., in *Re Jordon's Charity* (1832), 5 Sim. 571, 576, aff. 1 My. & K. 416.

intention must be used with caution, as is made clear in *Att.-Gen.* v. *Painter Stainers Co.* (1788), 2 Cox 51. There was a residuary bequest which was not exhausted by payment to the charities of the sums specified. Lord Thurlow, L.C., began his judgment with unenthusiastic remarks about the *cy-près* (*f*), remarks which are almost common form in the reports but which rarely lead to restrictive decisions. In a later passage he said (2 Cox p. 59): "I have no doubt but that when this testator made his will he meant to die testate as to his whole property; but the consequences of such a conjecture are not to be carried so far to induce the Court to find out an intention for him if he has declared none for himself . . . the words in their natural sense certainly go to limit the bounty to the number and extent particularised in the will; and on the other hand there being no words which in their natural sense apply to an indefinite bounty, I think it would be too much for me judicially to impute such a purpose to him. If it stood on the will, therefore, I should think the claim of the next-of-kin well founded". Nevertheless, he was able to find indications in the codicil which assisted the construction of a general charitable intention. Thus, the surplus residue was able to be used to increase the sums earmarked for the particular charities which the testator had selected.

It is the particular charities which benefit by the *cy-près* application of surplus in this line of decisions. For this reason, the following criticism of the *cy-près* doctrine by Wilmot, C.J., is inapplicable. Speaking of the subordination of the claims of the heir to those of charity even though the charitable disposition of the testator cannot take effect, he says (*g*): "As the motive inducing the disinherision in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place, *cessante causa, cessaret effectus*. The right of the heir-at-law seems to arise as naturally in this case as in any other; but instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of; perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish." But this criticism is pertinent to the next group of cases with which *Re Royce*, [1940] Ch. 514, must be ranked.

(b) If it is not possible to extend the particular charitable

(*f*) "There were cases soon after the Restoration which went to an extent to which they have not been since followed", etc. (*ibid.*, 55). Cp. the often-quoted remarks of Wilmot, C.J., in *Att.-Gen.* v. *Downing* (1768), Wilmot 1, 32: "If it were *res integra* much might be said for the heir-at-law", etc.

(*g*) *Att.-Gen.* v. *Downing, loc. cit.*

objects selected, will an immediate surplus be devoted *cy-près* to other objects?

This question is not simplified or affected by the rule that where the trustee appointed by the donor to hold specific amounts for named charities is itself a charity, the rule in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, may apply. The result of this rule is that the surplus may be presumed to be intended for the charitable trustee, the amounts specified being simply charges on that trustee's interest. In *Att.-Gen.* v. *Trinity College, Cambridge* (1856), 24 Beav. 383, the leading case on this point, the dispute arose some three centuries after the testator's death but it could be proved that there had been a surplus at the time of his death. It was held that this immediate surplus, together with its subsequently augmented value, could be retained by the college, the charitable trustee. In most of the reported cases in which the construction of the original disposition did not come into question until after a lapse of time, it could not be proved that there had been a surplus originally and the cases proceed on the footing that the increment was of subsequent date. In *Att.-Gen.* v. *Drapers' Co.* (1840), 2 Beav. 508, 511, where the rule in *Lassence* v. *Tierney* was not relevant, Lord Langdale, M.R., said: "It does not appear that at the time of the testator's death, there was or could be an income which would have left any surplus, but whether this were so or not", he was prepared to make a *cy-près* order, extending the testator's particular charitable objects. This case is an example of class (1) (a) or of class (2) (a) according as the surplus be treated as entirely subsequent or as existing from the beginning. The question is whether Lord Langdale, M.R.'s, disregard of the distinction between a subsequent and an immediate surplus is justified with respect to (2) (b) as well as (2) (a).

The point came near to being raised in *Re Forester*, 13 T. L. R. 555, and *Re Connolly*, 110 L. T. 688. In the former case the testator left residue on trust for the promotion of "such charitable purposes" as he should by codicil appoint. A codicil made provision for establishing a hospital and convalescent home but there remained a surplus after these had been established. It was held that the whole residue was impressed with a charitable trust, North, J., declaring that it was clear "that the gift in the will amounted to a dedication of the whole fund to charitable purposes" and that "the only question was, whether this clear trust for charitable purposes contained in the will had been revoked by the codicil". The codicil was "not a revocation of the general gift to charity contained in the will, but was only a statement how the fund was to be applied so far as was necessary for the special

purposes indicated". Thus, although it was necessary to order a scheme for the disposal of the surplus, there was no occasion to call in aid the *cy-près* doctrine : an express general trust for charity was carried out by means of a scheme, not a limited trust extended by a *cy-près* application.

In *Re Connolly*, 110 L. T. 688, there was a bequest of £500 to the priest in charge of a certain church for the discharge of the debt on the church and the schools attached, the debt having been reduced to £63 before the testator's death. Eve, J., asked (*ibid.*, 690) : "Is it a bequest for a particular charitable purpose and for that purpose only, in which case it will be effective only so far as that particular purpose is capable of being carried into effect; or is it a gift for a general charitable purpose to benefit the church and schools, with an indication superadded of the manner in which the testator desired his benefaction to be applied?" He held it was the latter kind of gift and directed the whole legacy to be paid to the priest on his giving an undertaking to apply it for the benefit of the church and schools. There was no question of *cy-près* in *Re Connolly*, which simply provides an instance of the rule that the Court need not treat as the essence of a charitable gift a provision concerned with the mode of its disposal (*h*) : the mode of benefiting the particular charities was no more of the essence of the gift than was the mode of accomplishing the general trust for charity in *Re Forester*, 13 T. L. R. 555. The specific objects of the testator's bounty alone benefited and Eve, J.'s, reference, in the above passage, to "a general charitable purpose" means the broad purpose of assisting the designated institutions as distinct from the restricted aim of helping them solely by paying off the debt. He was not referring to that general charitable intention which is at the basis of the *cy-près* principle.

The first case which illustrates the point under consideration, *Re Douglas*, [1905] 1 Ch. 279, has not been referred to in the more recent decisions. The testatrix made a residuary bequest with the words, "Any little money left for Milstead churchyard". Kekewich, J., made an order for a scheme disposing of the total amount of residue which was substantially more than could be required for the purpose specified. He admitted that "it was not her intention to leave between £3,000 and £4,000 for a purpose which would have been well answered by a small proportion of that sum" but he added : "To my mind it is a practical way of putting the matter to say that the question is, if she did not mean to dispose of the residue of the personal estate, what did she intend

(*h*) A rule which, *inter alia*, may make the rule against perpetuities inapplicable: *Chamberlayne* v. *Brockett*, 8 Ch. App. 206.

to dispose of?" (*ibid.*, 281). The answer to the question which Kekewich, J., could not find is surely, "As much of the residue as Milstead churchyard needs". Lord Thurlow, L.C., long ago exposed the error of construing a general charitable intention from the mere fact that the gift is residuary (*i*). At the most, it can be said that this form of gift assists the construction of a general charitable intention sufficient to introduce the *cy-près* rule. Yet Kekewich, J., who makes no reference to the *cy-près* doctrine or the existence or the non-existence of a general charitable intention, relies solely on the residuary nature of the bequest.

With *Re Douglas*, [1905] 1 Ch. 279, can be compared the decision in *Re King*, [1923] 1 Ch. 243, which is, however, not easy to reconcile with the later case of *Re Stanford*, [1924] 1 Ch. 73. In *Re King* the testatrix bequeathed her residuary estate for the erection of a stained glass window in a certain church : the surplus remaining after making provision for a window of the best possible kind was ordered to be devoted *cy-près* to the erection of further windows in the same church. The fact that the surplus was expended on the same church in the very manner chosen by the testatrix distinguishes this case from *Re Douglas* and *Re Royce*, [1940] Ch. 514, in which cases neither the particular churchyard nor the particular church choir could enjoy the surplus : the case is closer to those in (2) (a) than those in the present group. Romer, J., did not rely on the existence of a general charitable intention; he thought *Re Slevin*, [1891] 2 Ch. 236, C. A., sufficient authority for his ruling. But *Re Slevin* is not an instance of the *cy-près* principle proper, being a case of the failure of trust machinery. It was there held that if a charity ceases to exist after the death of the testator but before receiving a legacy, the legacy falls to be administered by the Crown with the rest of the trust property which will be applied, according to custom, to some analogous purpose. The Court of Appeal did not ask for proof of a general charitable intention because it was not needed. Apart from the possible legal merits of the actual decision the weight of authority is very unfavourable to the *ratio decidendi* in *Re King* (*k*). In *Re Stanford*, [1924] 1 Ch. 73, the testator left £5,000 on trust for the completion and publication of his etymological

(*i*) *Att.-Gen.* v. *Painter Stainers Co.* (1788), 2 Cox 51, 59, quoted *supra*, p. 203.
(*k*) In *Re Robertson*, [1930] 2 Ch. 71, in which the same, and in *Re Stanford*, [1924] 1 Ch. 73, in which a different, decision was reached the Court insisted on proof of a general charitable intention. See also *Re Monk*, [1927] 2 Ch. 197, C. A., and cp. Tudor on Charities, 172, note (*a*). Halsbury's Laws of England (2nd ed.), IV, 224, note (*l*), points out the unsoundness of another exception in which the *cy-près* principle has been said to apply without there being a general charitable intention.

dictionary. Eve, J., held that there was a resulting trust for the residuary legatee of the surplus remaining after due publication of the dictionary. His Lordship asked ([1924] 1 Ch. p. 75): "What evidence is there of any general charitable intention here beyond the particular purpose specified?" and added: "Unless such an intention is to be found the doctrine of *cy-près* cannot be applied."

The editor of the standard work on Charities appears to take the view that the fact that the bequest was not a residuary one distinguishes *Re Stanford* from *Re King* (*l*). But this fact, although relevant, is not decisive. However, he advances a novel and ingenious argument in support of this view. Because in *Re King* the residuary bequest is said to show that the testatrix did not intend to die intestate as to any part of her property but that she had relinquished all claim to it, it is suggested (*m*) that "the interest of 'charity' had therefore come within the rule in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551". No authority can be advanced for this personification of charity which, if justified, would considerably extend the scope of the *cy-près* doctrine. The Court has expressly refused (*n*) to treat Charity as an entity for the purposes of the rule in *Saunders* v. *Vautier* (1841), Cr. & Ph. 240, and a similar refusal can be expected should a similar argument be put forward for the purposes of the rule in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551.

It was held in *Re Robertson*, [1930] 2 Ch. 71, which professed to follow *Re King*, that that case is distinguishable from *Re Stanford* by virtue of the different construction which could be put upon the will as a whole; it was held that in the one case there was, and in the other there was not, a general charitable intention. This is the only satisfactory way of looking at *Re King* if that decision is to be accepted but it is not the ground on which Romer, J., based his judgment. In *Re Robertson*, [1930] 2 Ch. 71, the only other case of the kind before *Re Royce*, [1940] Ch. 514 (*o*), residue was left to be used towards the restoration and maintenance of a named church. After allowing for a liberal estimate of the cost of restoration and a provision of £200 for maintenance there was still a large surplus which Bennett, J., directed should

(*l*) Tudor on Charities, 159.

(*m*) *Ibid.* This suggestion is not connected with the case (*supra*, p. 204) in which the rule in *Lassence* v. *Tierney* may apply to charities.

(*n*) *Re Jefferies*, [1936] 2 All E. R. 626. This case is discussed in "Charity as a Legal Person" (54 L. Q. R. 25) an article by the present writer which glances at some of the evidence of a possible personification of Charity by equity.

(*o*) *Re Monk*, [1927] 2 Ch. 197, C. A., which Simonds, J., also relied on in *Re Royce*, decided that the possibility of a surplus thereafter was no reason for refusing to allow a charity to be established on the scale the testator directed.

be applied under a *cy-près* scheme. It is clear that he discovered a general charitable intention in the will (*p*).

The result of this examination of the authorities is that it is only *Re Robertson*, [1930] 2 Ch. 71, of the similar decisions previous to *Re Royce*, [1940] Ch. 514, which contains a *ratio decidendi* properly applicable to that case. In the three other cases having a bearing on the subject, there is *Re Stanford*, [1924] 1 Ch. 73, in the opposite sense, Romer, J.'s, subsequently criticised reasoning on facts which bring the case (*q*) nearer to class (2) (a), and an unsound and neglected judgment of Kekewich, J. (*r*). In principle, there is much to be said for the claims of the next-of-kin in *Re Royce* and much has been said for such claims by Chancery as well as Common Law Judges throughout the history of the *cy-près* doctrine. The three Lord Chancellors, Hardwicke (*s*), Eldon (*t*), and Chelmsford (*u*), have all pointed out that if the doctrine of resulting trusts had been developed and understood earlier than it was, the *cy-près* doctrine would not have attained the strength which it still enjoys. Lord Parker of Waddington was but expressing a widespread opinion when he more recently said (*x*) : " The rule of equity in this respect is well known, and, however admirable in the interest of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators." It may not be too late to deny dogmatically the application of the *cy-près* doctrine to the comparatively new class of cases which includes *Re Robertson* and *Re Royce*. On the other hand, the applicability of the doctrine being a question of construction in the cases to which it properly relates, it may be impossible to prevent the posing of the question of general charitable intention even where there is an immediate surplus which cannot be disposed of by expanding the particular object selected by the testator. If the question must be put in this class of case, we must consider the rules which guide the search for the answer. Some of the rules point to a negative answer.

The distinction between a general and a particular charitable intention is certainly " a very artificial distinction ", to use the words of Simonds, J., in *Re Royce*, [1940] Ch. p. 521. Several factors helped him to decide in favour of the broader intention in

(*p*) See [1930] 2 Ch. pp. 72—74.
(*q*) *Re King*, [1923] 1 Ch. 243.
(*r*) *Re Douglas*, [1905] 1 Ch. 279.
(*s*) *Att.-Gen.* v. *Johnson* (1753), Amb. 190.
(*t*) *Att.-Gen.* v. *Mayor of Bristol* (1820), 2 Jac. & W. 294, 318.
(*u*) *Mayor of Beverley* v. *Att.-Gen.* (1857), 6 H. L. C. 310, 319.
(*x*) *Bowman* v. *Secular Society, Ltd.*, [1917] A. C. 406, 442.

this case. First, the residuary nature of the gift. Sufficient has been said already about this factor. Second, the provision for the payment of the legacy to the vicar and churchwardens : " In more than one case it has been held that a gift out-and-out to a vicar and churchwardens or to any body of trustees is an indication that the testator intended the whole of the fund to be employed, if not in a particular mode, then according to a general intent " ([1940] Ch. p. 521). Further, he found that the gift was one of several gifts, all charitable, to which the testator had devoted his residuary estate and he thought that that was " a factor which has more than once been taken into account in determining whether or not there is a general charitable intent " (*ibid.*, 522). It may be noted that in *Re Harwood*, [1936] Ch. 285, where there was also a long list of charitable legacies Farwell, J., refused (*y*) to deduce a general charitable intention from this fact. But the consideration which Simonds, J., said appealed most to him was that " a gift simply for the musical services in a church is not charitable unless there is an underlying charitable intention ". It is believed that this is the first occasion on which reliance has been placed on such a consideration in determining whether there be a general charitable intention. Simonds, J., reasoned as follows ([1940] Ch. pp. 521, 522) : " The charitable intention (and I use the word ' charitable ' in its legal sense) in giving money for the purpose of musical services in a church is for the advancement of religion, and it is only the particular mode of carrying out that intent which is indicated when the testator directs that it is to be applied in the promotion of musical services. I find here, therefore, that the real intention of the testator was the advancement of religion through musical services; and if that is the real meaning of his words, then I have a general charitable intent to which effect can, and ought to be given, if the fund is more than sufficient for carrying out that general charitable intent by a particular mode." Presumably, therefore, the *cy-près* scheme would have to apply the surplus to the advancement of religion through musical services in some other church or churches than the one chosen.

It is respectfully submitted that the consideration which made most appeal in *Re Royce* is of no real assistance in the difficulty of construction. Even if it be said that a gift for musical services in a church is only charitable because of the underlying intention to advance religion, the intention is confined to advancing religion through a particular church, the church at Oakham which the testator selected. The testator's intention is in no way carried beyond Oakham church and remains a particular one. Further,

(*y*) [1936] Ch. p. 287. Cp. note (*a*), *infra*.

there seems to be no more need, for the purpose of establishing whether a trust is charitable, to take into account any underlying intention to advance religion in the case of a gift to the choir than in the case of a gift to erect stained-glass windows or to repair the fabric of the church. If the trust as carried out in the manner intended does in fact advance religion, then the trust is charitable and no further inquiry into intention is necessary or useful in deciding on the nature of the trust. In *Re King*, [1923] 1 Ch. 243, it was held to be immaterial that the motive in providing a stained-glass window was to perpetuate the memory of the testatrix and her relations. Neither the motive nor the intention behind the *form* of the *particular* gift seems to have a bearing on the question whether there is a general charitable intention in the *cy-près* sense. The reasoning in *Re Royce* gives a new meaning to that general charitable intention, a meaning which would make *cy-près* applications still more frequent than they are now.

Apart from considerations dependent on the terms of the testamentary disposition there are more general rules governing a *cy-près* investigation under which there is sometimes a presumption against a general charitable intention. Such a presumption is usually superior to arguments drawn from the terms of the disposition. There is a well-known distinction between cases in which the charity named by the testator has never existed and cases in which it once existed but has ceased to exist before his death. It is easier in the former than in the latter cases to discover a general charitable intention (*z*) and this rule of construction has been so strictly applied that there seems to be no instance of a *cy-près* application in the latter cases (*a*). It is suggested that a similar distinction applied to cases of an immediate surplus indicates the effect of the decisions. They show that a general charitable intention can be easily ascribed, at the present day, to a testator whose specification of named sums does not exhaust the total bequest, which can be used to expand his chosen charities. In this type of immediate surplus there is the argument that as the testator thought he had exhausted the total bequest by his monetary apportionment, he would wish the excess which he had not foreseen to be spent in the same way on the identical objects. This argument cannot apply to those cases, few, indecisive, and modern, in which an immediate surplus cannot be so spent. A presumption

(*z*) *Re Rymer*, [1895] 1 Ch. 19, C. A.; *Re Davis*, [1902] 1 Ch. 876; *Re Harwood*, [1936] Ch. 285.

(*a*) *Bunting* v. *Marriott* (1854), 19 Beav. 163, in which no reasons are given, is apparently the nearest but not an actual instance. It is difficult to imagine a stronger case than *Re Harwood*, [1936] Ch. 285, if there is ever to be a *cy-près* application in this kind of case. Cp. the remarks of W. S. H., 52 L. Q. R. 319.

against there being a general charitable intention in this class of cases—(2) (b)—would bring the Courts closer to the real intention of the testator.

In *Re Robertson*, [1930] 2 Ch. 71, and *Re Royce*, [1940] Ch. 514, the testator had one church in mind and one only; he would have been surprised to learn that a church of which he had never heard had benefited. In *Re Douglas*, [1905] 1 Ch. 279, the testatrix died in the belief that all the money she had left would go to Milstead churchyard and no other, and her wonder, on learning that it did not, would have been greater than that of the testatrix in *Re King*, [1923] 1 Ch. 243, who was commemorated in her parish church by more than the one stained-glass window, the cost of which was all she reckoned her legacy would meet. The position in these cases may be compared to that in *Att.-Gen.* v. *Bishop of Oxford* (1786), 4 Ves. 431; 1 Bro. C. C. 445 n. 2, followed in *Re Packe*, [1918] 1 Ch. 437. The testator left property for the erection of a church at Wheatley; on this appearing impracticable because of the refusal of the necessary episcopal licence there was no *cy-près* application but the next-of-kin succeeded in their claim. In *Att.-Gen.* v. *Minshull* (1798), 4 Ves. 11, 14, Arden, M.R., remarking that "formerly the doctrine of *cy-près* was pushed to a most extravagant length but that is now much restrained", instanced the case of Wheatley church: "It was pressed that the testator had a rage for building churches anywhere: Lord Kenyon said there was no such object: it was intended only for a particular parish and as it could not take effect there, it could not be anywhere else." In the above-mentioned cases of the (2) (b) type the testator also intended to benefit only an individual parish: he had no rage for maintaining churches, choirs, or churchyards anywhere. If it is reasonable to exclude a *cy-près* application where the trust is impracticable *in toto*, it is still more reasonable to exclude it where the object of the trust has been carried out. In the former event no satisfaction is given to the testator's charitable desires, in the latter event it is, and given as directed in the will. Here, there is no place for Wilmot, C.J.'s, classical justification of the *cy-près* doctrine by considering the testator's welfare in the hereafter: "The Court thought that one kind of charity would embalm his memory as well as another, and being equally meritorious would entitle him to the same reward" (*b*). Under (2) (b) the testator's memory is embalmed in the style he fancied: why should not the Court discourage the Attorney-General's attempt to obtain for him further supernatural rewards? The Court discouraged it, and rightly so, in *Re Stanford*, [1924] 1 Ch. 73.

(*b*) *Att.-Gen.* v. *Downing* (1769), Wilmot 1, 32.

In following *Att.-Gen.* v. *Bishop of Oxford* (1786), 4 Ves. 431; 1 Bro. C. C. 445 n. 2, the case of Wheatley church, Neville, J., in *Re Packe*, [1918] 1 Ch. 437, carefully explained the principle on which he acted. He said (*ibid.*, 442): "A question of this kind must of course always be to a very large extent a question of authority. The cases are numerous, and there are lines of decisions which ought not to be departed from; but they do not appear to me to affect this case. It seems to me, so far as assistance can be derived from the authorities cited, that this case is more like *Att.-Gen.* v. *Bishop of Oxford* than any of the others." This passage would inspire a contrary decision to that given in *Re Royce*. The other lines of decisions on surplus charitable funds do not affect the *Re Royce* type of case on which there is but scanty authority. Lord Eldon declared in one of the last of his many noteworthy judgments on charitable trusts (*c*) that: "Nobody can doubt, that, in matters of charity, this Court has taken very great liberties with the wills of testators; but, to the extent to which the Court has gone in decisions frequently repeated, a Judge, who is now to decide, must follow in the same track, recollecting that he owes a great deference to the opinions of those who have gone before him." In view of the paucity of previous rulings no disrespect would have been shown to Lord Eldon's exhortation by a different conclusion than that reached in *Re Royce* with regard to the disposal of the surplus. There would have been, on the contrary, a justifiable denial that a further kind of liberty with the wills of testators should be taken by the Court. If the Courts refrain from exercising this liberty, as they may, they will be helping to limit the *cy-près* doctrine, the limitation of which has been judicially recommended for more than two centuries.

APPROPRIATIONS AND ASSENTS IN FAVOUR OF A SURVIVING SPOUSE ON INTESTACY.

Certain of our readers having expressed the wish for such a form, we published a form of appropriation and assent (Vol. 4, p. 291) in respect of land in favour of a widow in part satisfaction of her statutory right on intestacy to £1,000 and interest. One of our correspondents has now written to us in connection with this form raising the whole question of appropriations and assents in favour of a surviving spouse. He says:

"Recently the following case occurred in our practice. A

(*c*) *Att.-Gen.* v. *Skinners' Co.* (1827), 2 Russ. 407, 441.

died intestate leaving a widow, B, and three children, all of age. Part of A's estate comprised realty of a value of £1,600 (subject to a mortgage of £300), and personalty of a value of £150. The bond was given by a trust corporation.

"Administration to the estate was taken by B, the widow, and one of the children. Part of the realty was sold, in course of administration, and the mortgage was repaid. The net value of the estate available for distribution was £1,250. The widow expressed a wish to take over the remainder of the realty towards her £1,000, and it was valued at £500 by a competent valuer. The children were all agreeable.

"However, this course did not commend itself to the trust corporation, who pointed out that the administrators held the real property upon trust for sale (A. E. Act, 1925, s. 33) and, in effect, the widow would be selling to herself.

"In this view we concurred. Despite the power of appropriation given by the Act (section 41), it seems to us that such a transaction, even if the children be separately advised, is open to objection by a purchaser from the widow. Emmett (*Notes on Perusing Titles* (12th ed.), Vol. II, p. 517) seems to consider that an administrator is a trustee for all the beneficiaries, and it is certainly a fact that a trustee should not place himself in a position where his duties and interests clash. In view of the decision in *Re Duce and Boots' Cash Chemists (Southern), Ltd.*, [1937] Ch. 642, section 36 (7) of the A. E. Act, 1925, does not give complete protection to a purchaser, and the assent, in such a case as we mention, would bear notice on the face of it that it was a sale, because of the stamp duty and the adjudication thereof.

"We agree that there is less objection to the form when the widow does not take the grant, or join in taking it, even if the net estate exceeds £1,000, but in the case we mention, a fairly common one, we venture to think that the form now given may prove a trap to the unwary, unless some note be attached explaining that it may be open to objection on the grounds we mention. . . . If administrators hold upon trust for sale, they must explain away the fact that the property was not sold and can only do so by saying 'It was appropriated'. If appropriated, surely a purchaser from a widow, in such a case as we mention, would say 'Then, in effect the widow sold to herself'.

"One other thing occurs to us. Would it not be well to call attention to the possibility of the necessity for the usual

certificate under the Finance (1909–10) Act, 1910, if the consideration does not exceed £500?"

It seems that the question of vesting land in a surviving spouse in satisfaction or part satisfaction of her statutory legacy of £1,000 given by section 46 (1) (i) of the Administration of Estates Act, 1925, has two aspects. First, How far is it legally possible to appropriate in favour of a surviving spouse, at all? Secondly, where such an appropriation is made, how can a good and marketable title be given?

No question arises in a case such as that contemplated in the form referred to above. There the grant of administration had not been made to the widow. Under section 46 (1) (i) of the Act her statutory legacy of £1,000 and interest is charged on the whole of the intestate's residuary estate. This charge must create "an interest" in the estate within section 41 and the personal representatives can, with the consent of the widow, appropriate land in satisfaction of this £1,000.

The difficulty arises where the grant of administration is to the surviving spouse and another person jointly. In this case it would seem that the spouse cannot concur in exercising the power of appropriation conferred by section 41 in his or her own favour. It is clear that an appropriation is in its essence a sale (*Re Beverly*, [1901] 1 Ch. 681; *Jopling* v. *Commissioners of Inland Revenue*, [1940] 2 K. B. 282. Administrators are as trustees incapable themselves of purchasing the deceased's property and therefore, it seems, they cannot appropriate in their own favour.

This difficulty can be got over if all the beneficiaries interested in the residue of the estate agree to the appropriation. Generally such agreement should be possible unless a minor is interested in the estate. Where no agreement can be reached, this of itself should show that the appropriation in question is not desirable. The fact that the beneficiaries are the children of the spouse does not affect their power to agree to the appropriation provided they are of full age, are independently advised and the land in question is properly valued. It is not understood how in the case mentioned in our correspondent's letter, the trust corporation, as trustee of the estate of the intestate, could object to the proposed appropriation. The widow and the children, who were of full age, were together absolutely entitled to the property and were in a position to terminate the trust for sale and direct the transfer of the property to whom they pleased. Where agreement is impossible owing to some of the beneficiaries being under age or for some other reason, and the £1,000 cannot be raised and paid, an application must be

made to the Court under section 57 of the Trustee Act, 1925, to sanction the appropriation.

The second aspect of this matter dealt with by our correspondent, is as to the manner of vesting the appropriated property in the surviving spouse so as to give a good marketable title. Here the difficulties appear not to be as great as are suggested. In the form of appropriation and assent referred to, the fact of appropriation is recited and this document bears the necessary *ad valorem* stamp. As was pointed out in the notes to that form, this is not the most satisfactory way of effecting the transaction. The best method in all cases of appropriation, and the one which must always be employed where the spouse is one of the administrators, is to effect the transaction by two documents. There should first be an appropriation which should bear the requisite *ad valorem* stamp. Where the spouse is one of the administrators this should be a formal document and the persons beneficially interested in the residuary estate should be parties to it. When this document has been executed (which will not, of course, come on the title), the legal estate in the property should be vested in the spouse by a simple assent which should contain no recitals and which will not require stamping.

If a simple assent is used a future purchaser thereunder will be entitled to the benefit of sub-section (7) of section 36 of the Administration of Estates Act, 1925, and the assent will be sufficient evidence that it was made in favour of the person entitled to have the legal estate.

This procedure avoids the difficulties raised by our correspondent. As the assent contains no recitals of appropriation and is not stamped, there is nothing therefore on its face, as there was in *Re Duce and Boots' Cash Chemists (Southern), Ltd.*, [1937] 1 Ch. 642, to put a purchaser on inquiry, and he can rely on the protection afforded by section 36 (7). It is to be observed that sub-section (1) of section 36 contemplates an assent being used to give effect to an appropriation and in the absence of anything to put him on inquiry, a purchaser will not be entitled to go behind the curtain of the assent to ascertain that the assent was made in favour of the right person. The mere fact that under section 33 of the Act the estate of an intestate is held on trust for sale is not of itself a fact which should put a purchaser on inquiry. He cannot know, unless he inquires, which he is not entitled to do, that the estate is not held in its entirety upon trust for one person. If the assent on the face of it is in order, it will confer a good marketable title which a purchaser is not entitled to question.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Separation deed—agreement "to live apart"—effect on subsequent divorce proceedings.—The changes made in divorce law by the Matrimonial Causes Act, 1937, do not appear to have been sufficiently considered in the drafting of separation deeds. Commonly the main purpose of a separation deed is to make arrangements for the payment of maintenance and, if there are children, to make provision for access, custody and education. *Long* v. *Long*, [1940] 4 All E. R. 230 offers a serious warning against the incorporation of any unnecessary terms. As reported, the facts apparently were that the wife deserted her husband without cause. Subsequently there was a separation deed providing for maintenance of the wife and the education of the child of the marriage, but also containing a recital that they had agreed to live apart and that neither would take proceedings for restitution of conjugal rights. In fact neither before nor after the execution of the deed did the husband acquiesce in the separation, but made repeated attempts to persuade his wife to return to him. He was also under the apprehension that the deed would not be a bar to divorce proceedings. He petitioned for divorce on the ground of desertion. The Court of Appeal upheld the decision of the President that the agreement to live separate operated to prevent proof of three years' desertion prior to the petition which therefore must fail. The Court expressed regret at being unable to assist the petitioner, but not even his misunderstanding of the effect of the deed was sufficient to enable the Court to disregard it. The Court distinguished *Pardy* v. *Pardy*, [1939] P. 288, because in that case the deed had been repudiated by the spouse who had caused the separation and neither spouse had treated it as governing their marital relations.

The effect of the decision here noted should be clearly to lead practitioners in most cases to adopt some different formula. There are cases, of course, in which the separation deed is designed primarily to give effect to an agreed separation in which neither party desires to contemplate matrimonial proceedings. It is thought that this is probably the rarer type of case. Usually it is either the result of one party deserting the other and preferring a deed to proceedings for maintenance or custody or both, or else the parties agree temporarily to live apart "to see what turns up".

In the first case it should be recited that the party has deserted "without cause" and that the agreements thereinafter have been entered into to avoid recourse to the Courts. The recital of desertion without cause was in fact made in *Long* v. *Long* (*supra*) and might have assisted the petitioner but for the subsequent parts of the deed. In the other case it is probably desirable either to have no recital or to have a recital that whereas by reason of matrimonial differences one party has decided to leave the other. In either case there should be no agreement to live apart inserted, and the agreements concerning maintenance, etc., should be expressed to be until such time as the parties shall live together again. In the second case the form suggested will probably prevent any petition being filed in respect of desertion until the agreement to live apart has been terminated by a request by one spouse to return to cohabitation followed by refusal on the part of the other. Otherwise there is no desertion without cause to satisfy the Matrimonial Causes Act, 1937.

Probate—entry of appearance out of time—practice.—Re Thomas, [1940] 4 All E. R. 145, is a short point on practice. The defendant was out of time for entering an appearance, and on approaching the Central Office was told he could not do so without a certificate from the Registrar. He did not appear, but was represented by counsel at the hearing. The learned Judge held that he could not allow an appearance at so late a date, but his attention was not called to R. S. C., O. 12, r. 22, under which a defendant can enter an appearance at any time before judgment, and the Court of Appeal decided that the learned Judge was wrong. The Court, therefore, ordered a rehearing of the case. The facts arose out of a misunderstanding, but the point should be emphasised particularly in its relation to proceedings in the Probate, Divorce and Admiralty and Chancery Divisions.

Emergency legislation—mortgage—no leave to sell if no personal obligation.—In *Re National Provincial Bank, Ltd.*, [1941] 1 All E. R. 97, it was held that where a mortgagee wishes to realise a security given as collateral security without a personal covenant by the mortgagor it is not necessary to obtain leave to sell under the Courts (Emergency Powers) Act, 1939. The reason upon which Farwell, J., based his decision was that under the Courts

(Emergency Powers) Act, 1939, s. 1 (4), the Court can only consider the question "whether a person liable to . . . perform the obligation is unable to do so by reason of the war". It should be noted that there is nothing in section 1 (2) requiring leave of the Court to exercise any remedy by way of taking possession or appointing a receiver which limits the requirement to those cases in which the person, whose property is affected, is under a personal obligation. The effect of this judgment, therefore, is to apply the reasoning to all those cases coming within sub-sections (1), (2) and (3) of section 1 so that no leave will under those sub-sections be required when the remedy is to be enforced against a person who is not under a personal obligation. At least this would seem to be the case. This question may possibly arise where, for example, a mortgage of settled land is made by trustees who are expressly made not personally liable in respect of the capital money raised. It is thought that at this stage it would not be wise to rely on this interpretation of the case, but in view of the fact that, if this contention is correct, the Court may not consider the effect of the war, the point might well be taken.

Emergency legislation—mortgage—appointment of receiver—evacuated area.—The short point in *Re Bikker*, [1940] 3 All E. R. 440, was whether a mortgagee could obtain leave to enforce his security in respect of property within an evacuation area in respect of money due before the date of evacuation. Morton, J., gave leave to proceed to enforce his security by appointment of a receiver, but held that as the principal had not been called in by three months' written notice (see regulation 4) the remedy could only be exercised in respect of that interest which had accrued due prior to the date of the order making the area an evacuation area under the Defence (Evacuated Areas) Regulations, 1940.

Emergency legislation — receiver for debenture holders — sale without leave.—Where a receiver for debenture holders has been appointed by leave of the Court under the Courts (Emergency Powers) Act, 1939, and by the debenture the receiver appointed is to be the agent of the company for all purposes it is not necessary for him to apply to the Court again for leave (*Re Wood*, [1940] 4 All E. R. 306. Morton, J., distinguished the instant case from *Re Brown*, [1940] 3 All E. R. 638, where Bennett, J., had held

that leave was necessary where after the appointment of a receiver for debenture holders the company had gone into liquidation. In the view of Bennett, J., the liquidation had determined the agency of the receiver for the company and had constituted the receiver agent of the debenture holders. Of this view Morton, J., expressed some doubt (see p. 305) but was not, of course, concerned to express a final opinion.

Having decided in favour of the exercise of the power without leave the learned Judge then went on to point out that in giving leave to appoint a receiver it was open to the Court in so doing to impose a restriction upon such leave. The learned Judge then referred to his judgment in *Re Trade Distributors* (unreported) in which he had given leave subject to a restriction in the order that the receiver should have no power to realise the security without the leave of the Judge in person. It is, therefore, necessary in an application for leave to appoint a receiver, where the company is not in liquidation, to be prepared to present any argument on the facts that may be appropriate to oppose such a restriction. It should also be noted that this decision depends upon the receiver being the agent of the company and not of the debenture holders, which may depend upon the terms of the debenture.

Emergency legislation—service of counter-notice in action for possession—practice.—Fishmongers' Co. v. *Donington Finance Co.*, [1941] 1 All E. R. 137, is important on a short point of practice in connection with the filing of a counter-notice in an action to recover possession for non-payment of rent. The Court of Appeal held that the rule requiring the counter-notice to be filed in eight days does not mean that a counter-notice filed after the expiration of eight days is valueless. In effect the decision appears to amount to this, that as long as a counter-notice is filed prior to the judgment for possession or the order to enforce the judgment by delivery of possession the Court must consider the claim of the defendant to the protection of the Courts (Emergency Powers) Act, 1939. In the instant case the judgment had been given and an *ex parte* application for an order for possession had also been made without knowledge of the filing of the counter-notice. In fact it had been filed the day before the *ex parte* application was made, but notice of it by post had not reached the plaintiff's solicitors. As the order was not drawn up before the plaintiff's solicitors received the notice the Court of Appeal said that the plaintiff's solicitors ought to have drawn the attention of the Master to the filing of the notice before drawing up the order. The Court did not express an opinion

on whether the Master would in such circumstances have power to set aside his order. It is improbable that all these circumstances would arise, but it remains clear that the plaintiff is not entitled to disregard the counter-notice if it is filed out of time and the proper procedure will be to issue a summons for the determination of the rights of the parties.

Emergency legislation—building agreement—lease to a nominee of contracting party—date of obligation.—In *Smallman* v. *Embassy Cinema, Ltd.*, [1941] 1 All E. R. 241, the material question was whether the obligation under a lease granted to a nominee had been created prior to the emergency. A building agreement was made prior to the war under which X and Y were bound either to take a lease themselves or to provide some other party as a lessee. Subsequently to the war a company was formed and in accordance with the building agreement X and Y nominated the company to take the lease. Subsequently the rent fell into arrear and in an action the question arose whether the company could obtain relief under the Courts (Emergency Powers) Act, 1939. The Court of Appeal held that there was no such right. So far as the company was concerned the obligations under the lease only arose at the date of the lease which was made after the date provided by the Act. The fact that the obligations originally arose under the building agreement, as they did, was quite irrelevant so far as concerned the defendant company. In the words of Sir Wilfrid Greene, M.R. (at p. 244): "These defendants being under no pre-war obligation —or, indeed, any obligation—to do so, chose after the beginning of the war to assume obligations contained in the lease. They were not in any way bound to do it. It was a matter of free choice on their part. Had the lease been granted to the original lessees, of course, that argument would not have applied, and very different considerations might have had to be taken into account, because the original lessees were under a contractual obligation to take the lease." These words are important because they indicate the leaning of the Court in construing section 1 (2), proviso, which takes outside the benefit of the Act debts or obligations "arising by virtue of a contract made after the commencement of this Act". Assignees of such a contract may not be protected by the Act provided the assignment takes place after the commencement of the Act. The relevant date appears to be that at which the party assumed the obligation and the date at which the obligation came into existence.

Settled land—capital and income—improvements—damages.—*Re Lindsay's Settlement* (*No.* 2), [1941] 1 All E. R. 143, is important for its consideration of what is within the meaning of "improvements" and within "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let". The property had on it certain cottages built about a hundred years ago, and in 1937 the local authority served certain notices under the Housing Acts, 1933—1936. As a result certain defects were brought to light and each cottage was substantially improved. Something like £5,000 was spent and the question that arose was whether it could be treated as a capital expenditure. Farwell, J. (at p. 146) said: "I think that, generally speaking, the word 'improvements', as used in this paragraph, does necessarily involve, when taken by itself, something which is not repair within the ordinary meaning of that word, but it seems to me that, in a case of this sort, where there has been an improvement of the cottages to a large extent by making considerable alterations to the drainage works and the actual structure itself, it is impossible to split up the total expenditure and say: 'This particular item for papering the walls of this room cannot be an improvement within the Act. Therefore it must be borne by the tenant for life.' That, no doubt, is perfectly true taken by itself, but, in my judgment, in a case of this sort, one must consider the whole matter as one. This is a case where it became necessary to improve property for this particular class of persons, and, in order to carry out that improvement, it became necessary to do, not only certain things which one could not call repairs at all, but also certain other things which might well be taken as repairs if dealt with individually, but which, as a whole, were all part of the work which was necessary in order to carry out the improvement." The test which the learned Judge therefore applied was whether it was necessary in order to bring about the improvement that all the works should be done.

He then discussed the question whether the expression "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let" (Settled Land Act, Sched. III, Part I, para. xxiii) was confined to "structural" alterations, etc. This had been held in the corresponding provision in the Settled Land Act, 1890: *Re Clarke's Settlement*, [1902] 2 Ch. 327. The learned Judge distinguished the present case, however, by reason of the part that in paragraph v of Part II of the Schedule it is provided for instalments to be payable for "structural additions to or alterations in" buildings whether or not they are to be let. This provision is new and the learned Judge pointed out that there might

well be a distinction between the desirability of making capital payments in respect of additions and alterations where the property is to be let and where the property is not to be let. He, therefore, decided that the absence of the word "structural" in the one provision and its presence in the other was sufficient ground for holding that *Re Clarke's Settlement* (*supra*) did not apply to the present Act. The importance thus attached to slightly different wording in two analogous provisions in the 1925 legislation is in keeping with the general trend of authority on these Acts. There are still a number of provisions of the Acts in which this apparent discordance exists and which have not yet been litigated, one or two of them of importance. Where they exist, therefore, practitioners must be on their guard for the correct interpretation of the Acts.

Re Lindsay's Settlement (*No.* 1), [1941] 1 All E. R. 104, decided a short point that may be of importance in a few cases. A claim was made for injury under a private Act providing for compensation and the claim was referred to an arbitrator under the Lands Clauses Act, 1845. Before the arbitration was heard the claim was compromised. Farwell, J., held that the money so paid was payable to the tenant for life and was not capital money for the purposes of the Settled Land Act. The learned Judge held that the act done in respect of which the compensation was payable was legal, because it was done under the private Act, and in these circumstances it fell within the principle in *Re Williams*, [1922] 2 Ch. 750. In his opinion it was not a case to which the Lands Clauses Act applied at all, but the moneys represented damages for a lawful act which had resulted in injury to the property and as such was payable to the tenant for life.

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2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Preferential claim for rent in case of execution—levying of distress for rates not an "execution" within Landlord and Tenant Act, 1709, s. 1.—The provisions of section 1 of the Landlord and Tenant Act, 1709, are explained in *Woodfall* (24th ed.) at p. 459. Briefly, they amount to this: that goods upon demised land may not be taken in execution unless the party at whose suit the execution is sued out pays the landlord before removal of the goods all arrears of rent due not exceeding one year's rent. It was held

by the Court of Appeal in *Hickman* v. *Potts*, [1940] 1 K. B. 29; 55 T. L. R. 1016, that levying a distress for rates under a justices' warrant is an execution within the above section, but this decision has now been reversed by the House of Lords. In *Potts* v. *Hickman* (1940), 57 T. L. R. 155, it has been conclusively determined that the word "execution" as used in section 1 of the Landlord and Tenant Act, 1709, does not include the levy of a distress for rates. It may be remembered that in this case (see the note of the case in *The Conveyancer*, Vol. 4, p. 96) a bailiff levied a distress for rates under a justices' warrant and removed the goods off the premises and sold them, with notice of but without satisfying the landlord's claim for arrears of rent. The effect of the decision of the House of Lords in *Potts* v. *Hickman* is to legalise such action on the part of the bailiff.

The opinions delivered by the learned Lords in the case are fully documented with reference to authorities on the nature of the remedy of distress for rates, and may well be referred to for the history of the remedy and the procedure applicable thereto. Perhaps the grounds on which the House of Lords reached its conclusion may be taken most concisely from the opinion of Viscount Maugham (57 T. L. R., at p. 161) where he says: "My Lords, I do not doubt that a distress warrant for rates is analogous to, and in some respects is an execution, nor that in an appropriate setting it might well be included in the word 'execution'. My conclusion, that it is not used in the wider sense in section 1 of the Statute of Anne, is formed on a consideration of the surrounding circumstances in 1709 and of a number of indications in the section itself. In particular I have reached my conclusion mainly on the following grounds: first, the section is dealing only with executions on judgments in proceedings *inter partes*; secondly, that in the case of a distress for rates there is, or at any rate there was in the year 1709, no such judgment involved; thirdly, that a bailiff appointed by churchwardens and overseers to distrain for rates in 1709 was not within the words 'sheriff or other officer' in their ordinary meaning; fourthly, if we consider the mischief which the Statute of Anne was intended to remedy, that there exists no reason for a strained interpretation of the section for the benefit of landlords; and lastly, that for over two centuries the legal profession seems to have accepted the more limited view of the meaning of the word 'execution' in the section."

With regard to the mischief which the statute was intended to remedy, we may note the words of Tindal, C.J., in *Taylor* v. *Lanyon* (1830), 6 Bing. 536, at p. 544, cited by Viscount Simon, L.C., in *Potts* v. *Hickman*. Tindal, C.J., says that the

statute of Anne " was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; for property so in the custody of the law could not be distrained . . .". It is hardly likely that the Legislature had in mind the possibility of local authorities colluding with tenants to defraud landlords of their rents.

Jurisdiction of the Court under the Landlord and Tenant (War Damage) Act, 1939—transfer of action from county court to High Court.—The Landlord and Tenant (War Damage) Act, 1939, provides by section 23 that, subject to the provisions of the County Courts Act, s. 111 (providing for removal into the High Court of proceedings commenced in a county court), the jurisdiction of the Court under that Act shall be exercised by a county court. *Clavering* v. *Conduit Mead Co., Ltd.* (1940), 57 T. L. R. 146, affords some guidance upon the question what proceedings commenced under the Act in a county court are proper for removal into the High Court. The fact that proceedings are brought under a recent Act and that there is an absence of judicial authority on difficult questions of law which may arise on the construction of it are, it seems, valid reasons in support of an application for removal into the High Court.

Practice under the Landlord and Tenant (War Damage) Act, 1939—procedure for removal into High Court.—The correct procedure in the Chancery Division for removal of proceedings under the Landlord and Tenant (War Damage) Act, 1939, from the county court to the High Court, is by summons served on the respondent and heard in the first instance before the Master. The procedure is not by *ex parte* originating summons or motion, since a matter ought not to be removed from the county court unless and until the other party has had an opportunity of being heard: *Re Portman and Roskill's Lease* (1941), 57 T. L. R. 267. The statement to the contrary at p. 2593 in the *Annual Practice*, 1941, followed in the earlier case of *Metropolitan Leather Co., Ltd.* v. *Hermann* (1940), 57 T. L. R. 167, is accordingly incorrect.

Rent restriction—when a dwelling-house may be said to be let to a tenant in consequence of his employment.—One of the grounds upon which the Court may make an order for the recovery of possession of a controlled dwelling-house without proof of suitable alternative accommodation is that the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment and the tenant was in the employment of the landlord or a former landlord and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment: 1933 Act, Sched. I, para. (g); *Woodfall* (24th ed.), p. 299.

Under this provision the question is whether the tenant was at the crucial time, namely, the date of the notice to quit, a tenant in consequence of such employment: *Read* v. *Gordon* (1941), 57 T. L. R. 268 (C. A.). Where the house was originally let to the tenant in consequence of his employment by the landlord, but after that employment came to an end there was a fresh letting by virtue of a new contract of tenancy, under which the tenant now holds, it can no longer be said that the dwelling-house is let to him in consequence of that employment, and accordingly the landlord cannot recover possession under this provision of the Act of 1933. The Court of Appeal, in reviewing earlier decisions, has disapproved the contrary view taken by Bray, J., in *Lever Bros.* v. *Caton*, 37 T. L. R. 664.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration—order of application of assets—construction—whether intention shown to displace the statutory order.—By virtue of Part II of the First Schedule to the Administration of Estates Act, 1925, which is applied by section 34 (3) of that Act to the administration of the estate of a deceased person who dies solvent, the debts of the deceased are to be paid primarily out of any property undisposed of by his will, and next out of property comprised in a residuary gift. Both the section and the schedule provide that the order thus prescribed may be varied by the will of the deceased. In *Re Harland-Peck, Hercy* v. *Mayglothling*, [1940] W. N. 373; [1940] 4 All E. R. 347, the will of the testatrix bequeathed a number of legacies and "subject to the payment of my funeral and testamentary expenses . . . debts and the legacies

bequeathed by this my will" devised and bequeathed the residue of her property to A and B in equal shares. B's share of the residue lapsed, and accordingly was undisposed of by the will: *Re Worthington*, [1933] Ch. 771, C. A. The question therefore arose whether the debts and legacies, etc., should be paid primarily out of the lapsed share of residue, or whether the will had shown an intention to oust the statutory order and to throw them upon the residuary estate as a whole. The latter alternative would mean that the debts, etc., would first be paid; only then would the "residue" be ascertained from what remained, and A would take one-half of that. The former alternative would mean that, before paying debts and legacies, the estate would be divided into two equal shares of which A would get one; the other share being sufficient (on the present facts) to cover debts and legacies. Farwell, J., adopted this former alternative, but the Court of Appeal held that the statutory order had here been ousted by the words of the will. The importance of this decision lies in the test which it formulates for these cases, of which there have recently been a confusing multitude—see *Re Sanger*, [1939] Ch. 238 (noted *ante*, vol. 3, p. 223). Fortunately it would seem that the previous decisions can be construed consistently with the test here provided. It is that the statutory order will be ousted if the will uses words which impose a charge upon the residuary estate in respect of the debts or other items the incidence of which is in question. A gift of residue "subject to" the payment of my debts, etc., was sufficient, before 1926, to change the order of administration of assets then in force, and did so in virtue of the fact that the words "subject to" imposed a charge upon the residuary realty and personalty. The Court of Appeal was unable to see why such a charge should not similarly change the modern order of administration, and accordingly held that it does. This decision apparently will rejuvenate pre-1926 authorities upon words which do or do not imply a charge upon the residuary estate. It is to be hoped that such research will afford to conveyancers some respite from the uncertainties which have recently troubled this aspect of the law.

Construction—"charitable or benevolent object or objects"—"educational or charitable or religious purposes"—whether over riding intention of charity—uncertainty.—The Court of Appeal has now, in *Re Diplock, Wintle* v. *Diplock*, [1941] W. N. 22; [1941] 1 All E. R. 193, overruled the decision of Farwell, J., in the Court below (noted *ante*, p. 73). It is well settled that a

trust is void for uncertainty if it purports to give the trustee a discretion to apply the trust property for purposes of which some are and some are not charitable. Accordingly, a gift to "such charitable or benevolent object or objects as my executors shall select" is void, unless one can construe the words to mean that only strictly charitable purposes are comprehended in the gift. This construction has sometimes been attempted by seeking to read the word "or" conjunctively. In the present case, however, Farwell, J., had taken the view that the context in which the gift was to be found (in that part of a will at which the testator seemed to have turned his mind to purely charitable benefactions) indicated that the testator made it with an overriding intention of charity. He had accordingly held that the gift comprehended charitable objects only. This view the Court of Appeal did not share: the natural and primary meaning of the word "benevolent" is not coincident with nor is it a mere narrower version of the word "charitable". If it is to bear a secondary and abnormal meaning which restricts it to charitable purposes some stronger context will be needed than the mere fact that it is employed in a part of the will which is otherwise exclusively devoted to gifts of a strictly charitable type. Moreover, it is not permissible to find an overriding intention of charity in the will as a whole by reading it with the omission of the significant word "benevolent". Nor was there here any justification for reading the word "or" in a secondary sense so as to mean "and", whereby the gift might be construed as restricted to objects which are both benevolent and charitable in the legal sense.

Subsequent to the above decision of the Court of Appeal, another similar problem arose before Farwell, J., in *Re Ward, Public Trustee* v. *Ward*, [1941] 1 All E. R. 315. Here the will contained a trust whereby the trustee was directed at his absolute discretion to devote the trust property to "the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit". The learned Judge held that in the present case there was no overriding general charitable intention disclosed by the will as a whole, or indeed in that part of it in which this trust was contained. Moreover, he explained that his decision in *Re Diplock* (*supra*) had turned upon this point, and not upon any failure to realise that the word "or" is in its primary meaning disjunctive or that the word "benevolent" in its primary meaning comprehends objects that are not strictly charitable. Although it would be difficult to argue that "educational or charitable" purposes

extend beyond the legal ambit of the word "charity" (the advancement of education being among those purposes which have been defined as charitable), the addition here of the words "or religious" was held to be fatal; the trust was accordingly held void for uncertainty. This decision is perhaps a little surprising, in that it implies that "religious" purposes are not necessarily charitable within the legal meaning of that word. The learned Judge, however, found that the authorities show that religious purposes are not necessarily charitable, and instanced *Farley* v. *Westminster Bank, Ltd.*, [1939] A. C. 430, where a gift to a vicar and churchwardens "for parish work" was held void as not necessarily confined to purposes strictly charitable. It might conceivably be argued, however, that the House of Lords in that case held the trust void for uncertainty because the words there used did *not* restrict the trust to religious purposes (*e.g.*, per Lord Atkin, at pp. 435—436), and that had the trust been so restricted the decision would have been different.

Construction—"testamentary expenses"—estate duty in respect of realty—Law of Property Act, 1925, *s.* 16—*legacies directed to be paid out of mixed fund derived from real and personal estate.*—Although estate duty payable in respect of personal property is a "testamentary expense", and is therefore ordinarily payable by the estate as a whole, estate duty in respect of real property is not: accordingly in the latter case, the devisee must ordinarily reimburse the personal representatives for estate duty paid in respect of the real property devised to him. Moreover, it follows that a direction in a testator's will that his executors shall pay "testamentary expenses" cannot ordinarily be construed to free the devisee from his liability to reimburse them for estate duty paid in respect of his devise. Such was the basis of the decision of Swinfen Eady, J., as he then was, in *Re Spencer Cooper*, [1908] 1 Ch. 130: "A general direction to pay legacies out of a mixed fund or residue charges them rateably on the portion attributable to realty and personalty . . . so far as the legacies are payable out of the portion attributable to realty they are real estate, and must bear their own estate duty, notwithstanding a direction to pay 'testamentary expenses' out of the mixed fund". This decision has now been approved by the Court of Appeal in *Re Owers, Public Trustee* v. *Death*, [1941] 1 Ch. 17. There the only substantial argument was counsel's contention that, in consequence of the property legislation of 1925, estate duty upon realty ought now to be regarded as a "testamentary expense". This argument was

founded largely upon section 16 (1) of the Law of Property Act, 1925, whereby the personal representative is expressly made accountable for " all death duties " payable on the death of the deceased in respect of any land which devolves upon them. It was argued, therefore, that estate duty upon real property, being now a duty which the personal representatives are compellable to pay, must now be regarded as a " testamentary expense ". This argument, however, ignores sub-section 5 of that section, whereby nothing in the section is to " affect the liability of the persons beneficially interested or their respective interests in respect of any duty, and they shall accordingly . . . repay the same . . . to the personal representative or other person accountable as aforesaid, as the case may require ". In view of this sub-section, it was therefore held that the Act intended to make no alteration in the ultimate incidence of death duties, so paid by personal representatives, as between the beneficiaries *inter se*. Accordingly, a testator, when directing that " testamentary expenses " be paid by his personal representatives, cannot ordinarily be construed to mean that this payment is not to be followed by a final adjustment among the beneficiaries in the manner which is normally required of them under the general law. It therefore follows that a testator who wishes to ensure that a devisee, or a legatee whose legacy is made payable out of the testator's realty, shall not be required to reimburse the general estate in respect of estate duty paid by the personal representatives, should clearly indicate in his will that this is his intention.

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4. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Surtax—covenant to pay proportion of income—whether income includes sum apportioned under Finance Act, 1922, *s.* 21.—The decision in *C. I. R.* v. *Payton*, 19 A. T. C. 271 (commented upon in *The Conveyancer*, December, 1940, at p. 154) has been reversed by the Court of Appeal: Tax Leaflet No. 1098. The question to be considered was the construction of a deed of covenant by which the covenantor had bound himself to make annual payments of

an amount equal to one-fourth of his income as defined in the deed. "Income" was defined as meaning "the income of the settlor as computed for the purpose of the Income Tax Acts . . . after deducting therefrom all [such] annual sums, annuities or interest, excluding the sum payable under this deed, as are allowed as deductions in computing the total income for the purpose of the said Acts". Under the companies surtax legislation part of the income of a privately controlled company had been apportioned to the covenantor, and the question arose whether the sum so apportioned fell to be included in computing his income for the purposes of the deed. Lawrence, J., held that it did not, but the Court of Appeal was unanimous in taking the contrary view. The grounds on which the Court of Appeal came to the conclusion that the apportioned income fell to be included are most fully stated in the judgment of Greene, M.R. Lawrence, J., had been impressed by the contention that the language of the deed, and especially the reference to such sums "as are allowed as deductions in computing the total income", showed that a distinction must be drawn between total income and the income referred to in the words "the income of the settlor as computed for the purpose of the Income Tax Acts". To this Greene, M.R., replied that, if so, "income" could only mean income subject to direct assessment, since the only computation of income in which income taxed at the source is included is a computation of total income. As against this, there was admittedly the difficulty that it is only for the purpose of assessment to surtax that income apportioned under the companies surtax legislation falls to be included in computing the total income of the individual; it does not fall to be included in computing his total income for the purpose of a claim to relief, or, in other words, in connection with a repayment claim. Thus, the language of the deed did not permit of any wholly satisfactory construction, but as between the two alternative views the Court of Appeal was unanimous in preferring that which included the apportioned income in "income" as defined by the deed, notwithstanding that for one of the purposes of the Income Tax Acts, *viz.*, a claim to relief, such income forms no part of the individual's income or total income. This last point is worth noting, the converse being that, if and when the apportioned income, or any part of it, is actually distributed, it will form part of the individual's total income for the purposes of a claim to relief, though it will, as provided in section 21 (4) of the Finance Act, 1922, be excluded in the computation of his total income for the purposes of surtax. It should be added that the Court of Appeal gave leave to appeal to the House of Lords.

Purchase of annuity — after annuitant's death unexhausted balance (if any) of purchase price to be made up by payments to nominee—capital or income.— The decision in *Perrin* v. *Dickson*, 14 T. C. 608, must now be read in the light of the judgments in the Court of Appeal in *Sothern-Smith* v. *Clancy*, Tax Leaflet No. 1101. The facts in that case were that, in consideration of a lump sum payment of $65,423 an American insurance society had agreed with X to pay him an annuity of $6,510 during his life, and had further agreed that, in the event of his dying before the aggregate amount of the payments had reached $65,423, a person nominated by X should receive an annuity of $6,510 until $65,423 should have been paid by the society under the contract. In the agreement between the parties the lump sum payment was described as " capital invested " and the annuity as a " refund annuity with continuation of payments until capital invested has been returned ". In the events which happened the annuity became payable, after the death of X, to his nominee, Y, and the question which arose was whether Y was taxable in respect of the annuity under Case III of Schedule D. It was contended on behalf of the taxpayer that, when the real nature of the transaction was looked at, it would be seen that, to the extent of the sum paid to the society, the " annuities " represented a mere return of capital by instalments. Not until that sum was exceeded (as it might have been exceeded had X's life been sufficiently prolonged) could moneys paid under the contract be of the nature of income. Such was the argument, and in support of it reliance was placed on *Perrin* v. *Dickson*, above, where the Court of Appeal had to deal with certain " annuities " paid by an insurance society under an educational policy. In that case evidence had been given before the Appeal Commissioners to the effect that the sums payable under the policies were calculated so as to return to the parent, in the event (which happened) of the child surviving throughout the benefit period, the amount of the premiums, with compound interest at 3 per cent. If the child had not survived the benefit period, the parent would have got back what he had paid, less any payments made under the policy, but without interest. In any event the parent was assured of getting back an amount equal to the amount of the premiums. The Court of Appeal took the view that—to quote Lawrence, L.J.—" the real nature of the transaction was closely analogous to that of the deposit of money in a bank or of the loan of money, to be returned in any event to the person making the deposit or loan, either without or with interest, according to whether a certain event might or might not happen ". The conclusion reached in *Perrin* v. *Dickson* was that the " annuities " must be dissected so as to distinguish

the interest element from the amount representing a return of the moneys paid by the parent, and that tax was chargeable only on so much of the " annuities " as represented interest.

In *Sothern-Smith* v. *Clancy*, above, the Court of Appeal, though pressed by *Perrin* v. *Dickson*, perceived a clear distinction between the two cases. In *Perrin* v. *Dickson* the company's liability could never exceed the amount of the premiums, with compound interest at 3 per cent. On the other hand, in *Sothern-Smith* v. *Clancy*, the society's primary obligation was to pay the annuity to X for the term of his life, this being supplemented by the additional obligation to make payments to his nominee after his death to the extent (if any) to which such payments might be required to bring the aggregate amount of the payments up to the amount of the consideration received by the society. This added obligation could not—it was held—change the character of the annuities from income payments to capital payments merely because it was an obligation to be measured by reference to the amount of the capital sum paid by X. The society's contract was, in effect, a contract to pay an annual sum for a certain period of years or for the period of X's life, whichever period should be the longer. The annuities here in question were, in fact, annuities payable, after the death of X, to his nominee and payable, therefore, by virtue of the society's undertaking to ensure that the payments made should in any event be of an aggregate amount equal to the amount of the premium; but it was held that the nature of the transaction was such that the annuities represented taxable income, whether paid to X during his lifetime or to his nominee after his death. While *Perrin* v. *Dickson* was distinguished, there are observations in the judgments which suggest that that decision caused the Court some discomfort. Thus, Greene, M.R., said: " I must confess that I find the reasoning of the judgments in that case [*Perrin* v. *Dickson*] difficult to follow ", and Clauson, L.J., referred to certain questions which might be raised if the decision in *Perrin* v. *Dickson* should come to be considered by a Court having power to overrule it. It seems clear that *Perrin* v. *Dickson* raises some difficult questions as to terminable annuities, and if *Sothern-Smith* v. *Clancy* goes, as it seems likely that it will, to the House of Lords, those questions will doubtless be ventilated.

Annual payments—payment made before passing of Finance Act for the year—omission to deduct tax—Income Tax Act, 1918, *s.* 211 (2).—Section 211 of the Income Tax Act, 1918, is designed

to deal with the situation which arises where a payment from which tax is deductible is paid in a given year of assessment before the passing of the Act renewing the tax and fixing the rate for that year. Sub-section (2) of section 211 is concerned with payments made before the passing of the annual Act in respect of rent, interest, annuities and other annual payments, and provides that if tax has not been deducted, or has been deducted at a rate lower than that eventually fixed by the Act, then, when the Act has been passed, the omission to deduct or the under-deduction, as the case may be, may be made good by deduction from the next payment made thereafter. If no payment remains to be made after the passing of the Act, the amount not deducted may be recovered as a debt. In *Hill* v. *Kirshenstein*, [1920] 3 K. B. 556, Scrutton, L.J., is reported to have said, with reference to section 211, that "sub-section (2) applies where the tax is not to be accounted for to the Crown", the inference being that the sub-section does not apply where the payment has to be so accounted for, *i.e.*, where it is not made out of profits or gains brought into charge and is consequently within the scope of Rule 21 of the All Schedules Rules. In *Nesta, Ltd.* v. *Wyatt*, [1940] 4 A. E. R. 217, Macnaghten, J., suggested that on this point Scrutton, L.J., might have been misreported and pointed out that the statement attributed to the Lord Justice was in any case an *obiter dictum* not required for the decision arrived at in *Hill* v. *Kirshenstein*. The learned Judge was unable to perceive any ground for limiting the application of section 211 (2) to cases within Rule 19 of the All Schedules Rules and held that it applied also to cases within Rule 21. He further decided that, where section 211 (2) is invoked, it is no answer to say—even if it can be said with truth—that the deduction might have been made at the time of payment under the Provisional Collection of Taxes Act, 1913.

Revocable covenants for annual payments—Finance Act, 1938, *s.* 38 (1).—The effect of section 38 (1) of the Finance Act, 1938, is, briefly stated, that annual payments payable under a revocable settlement fall to be treated as the income of the settlor and not of any other person. Such payments are not, therefore, deductible in the computation of the settlor's total income, nor do they count as part of the recipient's total income for the purposes of a repayment claim. By virtue of sub-section (7) of section 38, it is immaterial whether the settlement was made before or after the

passing of the Act. By virtue of the same sub-section, the provisions of the section apply, subject to certain qualifications, for the purposes of assessments for 1937–38 and subsequent years, so that they have a retrospective effect, which is, however, mitigated to the extent of the relief provided by Part II of the Third Schedule to the Act. In *C. I. R.* v. *Becher*, Tax Leaflet No. 1087, annual payments in the shape of monthly sums had been payable under a deed executed in August, 1937, and had been duly paid until the deed was revoked on April 19, 1938. The 1938 Act was passed on July 29, 1938, and the question which arose was whether its retrospective application to 1937–38 extended to the case of a settlement which had been revoked before the Act was passed. In other words, could section 38 apply to a settlement which, at the date of the passing of the Act, was not in existence? Lawrence, J., decided that it could, holding that, whether the settlement was or was not in existence at the passing of the Act, a sum payable by the settlor after the commencement of 1937–38 was caught by section 38 (1), if, at the time when the sum became payable, the terms of the settlement were, in fact, of the nature described in the sub-section.

Transfer of income to persons abroad—Finance Act, 1936, *s.* 18.—In *Exors. of Admiral Earl Beatty* v. *C. I. R.* and *Beatty* v. *C. I. R.*, Tax Leaflet No. 1092, two questions arose on the transfer of income provisions of the Finance Act, 1936. The first related to certain debentures issued by a company incorporated in Canada. Certain assets of the value of $465,000 had been transferred by a person ordinarily resident in the United Kingdom to a company incorporated in Canada. The purchase price was satisfied by the issue of ninety-three debentures of $5,000 each, making $465,000 in all. The debentures bore no interest. They were redeemable in blocks of five a year over a period of years. In resisting an assessment under section 18 of the 1936 Act, the transferor contended that he was merely getting back his capital by instalments and could not, therefore, be said to have "power to enjoy" any income of the company. This contention was rejected by Lawrence, J., who held that, the debentures being charged upon all the assets of the company, the transferor was caught by the definition of "power to enjoy" in sub-section (3) of section 18, and, in particular, by paragraph (c), the effect of which is that an individual is to be deemed to have power to enjoy income of a person resident or domiciled abroad if he "receives or is entitled

to receive, at any time, any benefit provided or to be provided out of that income . . . "

The second question which arose in these cases related to a series of transactions commencing with a transfer of assets by A to a Canadian company, X, Ltd., and a transfer by B to another Canadian company, Y, Ltd., both A and B being ordinarily resident in the United Kingdom. The transfers took the form of cash subscriptions for shares. Subsequently, A and B executed deeds of gift, the effect of which was to transfer A's holding in X, Ltd. to B and B's holding in Y, Ltd. to A. It was held that the exchange effected by the deeds of gift did not save A and B from being caught by section 18. It was true that the income which A now had power to enjoy was not income of a person to whom he had made a transfer of assets, and that the same could be said of B. But it was pointed out by Lawrence, J., that the question which arises under sub-section (1) of section 18 is whether the transfer, either alone or in conjunction with associated operations, has resulted in the individual acquiring rights by virtue of which he has power to enjoy " any income of a person resident or domiciled out of the United Kingdom ", which does not necessarily mean the income of the person to whom the transfer was made. In this case each of the individuals concerned had made a transfer of assets resulting in income becoming payable to a Canadian company, and by means of that transfer, in conjunction with an associated operation in the shape of a deed of gift, had acquired rights by virtue of which he had power to enjoy income of another Canadian company. The requirements of section 18 were, therefore, satisfied.

Surtax—settlements—Finance Act, 1938, *s.* 38 (1) *and Third Schedule, Part II.*—The decision in *C. I. R.* v. *Payne*, 19 A. T. C. 224 (commented upon in *The Conveyancer*, December, 1940, at p. 155) has been affirmed by the Court of Appeal: Tax Leaflet No. 1099.

Surtax—annual payments—Finance Act, 1922, *s.* 20 (1) (*b*).—The decision in *C. I. R.* v. *Black*, 19 A. T. C. 343 (commented upon in *The Conveyancer*, December, 1940, at p. 156) has been affirmed by the Court of Appeal: Tax Leaflet No. 1096.

THE LIBRARY.

The Limitation of Actions. By C. H. S. PRESTON and G. H. NEWSOM, Barristers-at-Law. The Solicitors' Law Stationery Society, Ltd. 480 pp. 1940. (£1 12*s.* 6*d.* net.)

THE Limitation Act, 1939, passed on May 25, 1939, and which came into operative force on July 1, 1940, is entitled "An Act to consolidate with amendments certain enactments relating to the limitation of actions and arbitrations". In the main it does consolidate the most important of the old Statutes of Limitation, but, as the heading states, "with amendments"; and these are by no means negligible. Amongst these amendments are a statutory period of limitation to foreclosure on pure personal estate (section 18), and in certain cases (section 3 (2)) in regard to chattels when the time has run the remedy is not only barred but the title of the rightful owner is extinguished, but these are only some of the amendments.

A cautious practitioner, accustomed to the old Acts, will do well when approaching any question of bar of action by limitation, to dismiss entirely from his mind all knowledge he may have of the old Acts, to treat the matter as altogether *de novo*, and to begin at once on the text of the new Act.

In this he will be greatly helped by the authors of this book in review, who have made a dull and repulsive subject, if not interesting, at least tolerable.

They had, it is true, the advantage of commenting only on a single Act, but have made the best use of that advantage. No longer will it be necessary for the practitioner to study the learned but arid work of Darby & Bosanquet, and to hunt amongst *Carson's Real Property Statutes* for the requisite section and notes. He has everything he needs here before him in a book thoroughly well arranged and documented.

At the end of the work the statute is printed in full, with at the relevant passages references to the pages where the text is discussed in full in the earlier part of the work; and at those pages the authorities establishing the law as it stood before the new Act are very lucidly and accurately stated, and then the authors' views are given as to how, if at all, those authorities are affected by the new Act.

It is no part of our duty to discuss new points that may arise on a perusal of the new Act; this would demand a short essay: but our authors have anticipated and dealt with a considerable number of such points, and all that have occurred to the reviewer on a casual perusal of the Act.

We feel that we can with confidence recommend this new work to the profession, with a feeling of profound regret that Mr. Preston—who has, we understand, lost his life in the service of his King in this present war—cannot live to see the new editions of this work which we venture to predict time and decisions of the Court will demand.

F. E. F.

Key & Elphinstone's Compendium of Precedents in Conveyancing. Fourteenth edition. Vol. II. Edited, as to the sections intituled "Mortgages", "Settlements" and "Wills" by FREDERICK EDWARD FARRER, one of the Conveyancing Counsel to the Court, of New College, Oxford, and of Lincoln's Inn, Barrister-at-Law, and as to the remainder by the late MARCUS R. C. OVERTON, M.A., sometime Scholar of Trinity College, Oxford, and of Lincoln's Inn, Barrister-at-Law, assisted by CHARLES ANTHONY GOODALL SIMKINS, B.A., sometime Scholar of New College, Oxford, and of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1940. cxliv and 1192 pp. (3 vols., £6 15*s.* net.)

THE preparation of this volume was much delayed by the tragic death of Mr. Overton on active service and the absence also on active service of Mr. Simkins. Mr. Simkins in his preface to the three volumes, which appears in Volume II, explains how difficult the preparation of the new edition has been and how greatly he was assisted by Mr. Overton's wife and his own wife in preparing this volume for press.

As I pointed out in my review of Volume I, there are now no abbreviations at all in K. & E., a great advantage, especially when so many clerks and other assistants have not been fully or even partially trained in the law.

There are many new and excellent forms in this volume, one in a most unexpected place, for who would look under "Wills" (p. 871) for a "Deed Poll by a female annuitant under a will annulling restraint on anticipation and authorising the purchase of a government annuity"?

Mr. Farrer contributes very able and learned articles and notes, especially on personal settlements (pp. 547 *et seq.*) which is clear and will be useful, and on the modern Rule against Perpetuities which sets out the main points on the Law of Remoteness to be recollected in Drafting.

Mr. Farrer in note (*f*) on p. 947 points out why he has omitted the clause making counsel's opinion conclusive on the construction of the will, very properly states that the Court and not counsel is the proper forum for construction and it is considered to be wholly improper to bind or purport to bind the rights of parties on construction by counsel's opinion: see *Re Raven*, [1915] 1 Ch. 677. We doubt very much, however, whether Form XXIV on p. 1001 (an exercise of a power of appointment by a testatrix of the whole income during her husband's lifetime to infant sons and unmarried daughters where there is no power to appoint an interest to a husband) is not in fact a fraud on the power so far as it authorises income to be paid to the husband without liability to account.

Mr. Farrer points out on p. 553 the defects of the protective trusts defined in the Trustee Act, 1925, s. 33, but does not give the draftsman any alternative trusts (see pp. 573 *et seq.* and 882 *et seq.*); the full forms were set out in the eleventh edition (see pp. 589 *et seq.*) and in particular the full discretionary trust on p. 593. Readers of *The Conveyancer* will find a very excellent form of discretionary trust drafted by Mr. A. H. Withers on p. 398 of Vol. 1 (new series).

In the excellent preliminary note on Mortmain and Charity there is

a new note as to the jurisdiction of the Charity Commissioners (note 33, p. 296) the learned author adopts the views set out in Vol. 16 of *The Conveyancer*, p. 115, on Mixed Charities and which Mr. Withers expressed in his articles on Mixed Charities in the *Solicitors' Journal* for November, 1924.

Taking the volume all round it is a great improvement on the earlier editions and contains much new matter, the cases have been brought up to date by Miss Bicknell who also drafted the war-time precedents in Volume III. Miss Vaizey is to be congratulated upon the index she has provided. It is very sad that Mr. Overton did not live to see the completion of his arduous task as Editor of this edition, he would justly have been proud of it.

In my review of Volume I on p. 160 of the last number of *The Conveyancer* "No" was omitted in the seventh line from the end. "It is part of the duties of" etc., should, of course, have read: "It is no part of the duties of . . .".

D. C. L. C.

Loose-Leaf War Legislation, 1940. Edited by JOHN BURKE, Barrister-at-Law. Hamish Hamilton (Law Books), Ltd. (5*s*. per part.)

WE continue to receive promptly and regularly the parts of this useful collection of Acts and Regulations. Annotations to the more important ones, such as the Courts (Emergency Powers) Act, 1940, and the Defence (Evacuated Areas) Regulations, add greatly to its practical value. A useful feature is the Special Taxation Part containing the Finance Acts of 1940, Purchase Tax Regulations, Excess Profits Tax Regulations, etc., with an index (price 7s. 6d.).

Law of Civil Defence. By R. WYNNE FRAZIER, Barrister-at-Law. The Solicitors' Law Stationery Society, Ltd. 1940. 2,240 pp. (£5 5*s*. net.)

THE "Civil Defence Code" was barely seven weeks old when the outbreak of war produced a spate of emergency legislation to adapt to actual war conditions "the legal embodiment of a form of insurance against the outbreak of war". In these circumstances the difficulties attending the completion and publication of Mr. Frazier's work can well be imagined. As a testimony of courage it deserves the highest commendation.

The presence of an addendum needs no apology, and critics who may deplore the fact must be content with the assurance that it is not hidden at the back of the book and is extremely well cross-referenced.

A fundamental difficulty in connection with the subject-matter is a precise definition of "civil defence" itself. Mr. Frazier is of the opinion that it is not limited to defence against hostile attack from the air. That we are left with only the unsatisfactory definition of "Civil defence functions" contained in the 1939 Act is regretted. Book I is a narrative account of civil defence functions which gives the reader, who may be unfamiliar with the whole, a comprehensive view of the powers and duties placed upon Government departments, local authorities, and others. The section dealing with the incidence of functions is in tabular form and particularly useful to those having direct responsibilities for matters of civil defence. There is also a section dealing with financial matters such as grants, compensations, etc. The effect of the new law on commercial undertakings and private individuals is also carefully studied.

Books II and III deal with the Civil Defence Acts, 1937 and 1939. The author gives full introductions to the 1937 Act and to each of the various parts of the 1939 Act. These introductions comprise clear accounts of the matters contained in the statutes and set out the problems which arise. Matters of detail are reserved for the notes to the various sections.

Book IV in the like manner deals with the war legislation and includes the Emergency Powers (Defence) Act, 1939, the relevant Defence Regulations and Orders, the Compensation (Defence) Act, 1939, Personal Injuries (Emergency Provisions) Act, 1939, Essential Buildings and Plants (Repair of War Damage) Act, 1939.

Obvious as it should be, perusal of Mr. Frazier's work makes even plainer the large extent to which the law and legal practice has been affected. Air-raid shelters, black-out, camouflage, casualty and disease services, evacuation, water supplies, requisitioning, to take but a few, will give rise to practical legal problems, many of which Mr. Frazier deals with in detail.

His sections headed "Conveyancing" in the introductions to Parts II and III of the 1939 Act are particularly interesting.

To summarise, Mr. Frazier's style and method is clear and the result is a book of reference which will be of great assistance to those who, in the words of the publishers, "have direct responsibility under the Act or are acting in an advisory capacity to others".

The Law of Income Tax. By E. M. Konstam, K.C. Eighth edition. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. (£2 12*s*. 6*d*. net.)

Konstam on Income Tax has so well deserved a reputation that it would be a real misfortune if it were allowed to become out of date. To the great advantage of those compelled to grapple with the intricacies of the Income Tax Acts, Judge Konstam has not shrunk from the exacting labour of periodical revision. He might—had he been less conscientious—have contented himself with mere supplements, leaving the reader to fit the new material into the body of the work. But that is not his way. His purpose is to present, as far as possible, a complete and coherent picture of the law as it stands at a given moment, and where there is

fresh material to be handled he deftly works it into its proper place. All this means harder work for the author but much easier reading for his public, who will be duly grateful. In bringing his Treatise up to date he has once again had to hack his way through a jungle of new legislation. This time the growth is even more than usually luxuriant. Since the seventh edition appeared in 1936, there have been no less than six Finance Acts, and between them they have made far-reaching changes in the law, amounting in certain cases to something like a transformation. As examples may be mentioned the sweeping alterations effected by the 1937 and 1939 Acts in the companies' surtax legislation as it applies to investment companies; the provisions of Part III of the 1938 Act with regard to income arising while an estate is under administration; Part IV of the 1938 Act, with its elaborate safeguards against tax avoidance through the medium of settlements; and the remoulding, by the 1940 Act, of the law relating to rents and annual payments in respect of land. These are only some of the more important of the changes in the law which are digested and explained with admirable conciseness and with a clarity all the more remarkable in view of the cryptic language in which the Legislature has not infrequently expressed itself. In dealing with this immense mass of new legislation (to say nothing of new decisions) the author would be more than human if he never failed to command universal assent. Thus, for example, in his explanation (pp. 353 ff.) of Part IV of the 1938 Act, his use of the word "revoked" might be misleading to a reader who did not realise, having looked up section 38 (1) of the Act, that it is not essential that there should be a power of revocation in the ordinary sense of that expression, as witness (for instance) the decision in *C. I. R.* v. *Payne*. Again in the summary of section 38 the words "the like annual payments are payable", in the proviso to sub-section (1), are represented (p. 353) by the words "the amounts of the annual payments are equal". It seems open to question whether "like" payments must necessarily mean payments of equal amount, to the exclusion of a series of payments unequal in amount but quantified by reference to the same measure. In the text of section 20 (1) of the 1922 Act, as printed at pp. 607 ff., mention is made of the repeal of paragraph (*a*), but without any reference to the relevant provisions of section 41 of the 1938 Act, and paragraph (*c*) is printed without anything to indicate that it has, in effect, been repealed by section 21 (11) of the 1936 Act. The amendments introduced in the transfer of assets provisions of the Finance Act, 1936, by section 28 of the 1938 Act are duly incorporated in the text of those provisions, as printed at pp. 695 ff., but it is not made clear that, notwithstanding section 18 (7) of the 1936 Act, the earliest year of assessment in respect of which the amendments take effect is 1937–38. But these are only illustrations of the comparatively small points which it must always be possible to raise where the ground covered is so extensive and the subject-matter so intractable. Little holes can be picked here and there, but in its handling of an immense mass of peculiarly intricate law, *Konstam on Income Tax* —the eighth edition no less than its predecessors—must be ranked as a model of skilful arrangement and helpful interpretation.

LEONARD STEIN.